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IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW

INTRODUCTION

The law of armed conflicts is valid — and meaningful — only to the extent that it is implemented. Pacta sunt servanda. *This axiom should be engraved in the conscience of mankind. Undeviating compliance with it should go without saying, since what is at stake is no less than the protection of victims of armed conflict and the limitation of the violent effects of war.*

Yet it must be acknowledged, in sorry repetition, that this is not always the case. First of all, international humanitarian law (IHL), which is a compromise between military and humanitarian imperatives, is often respected only when it overlaps with State interests. Secondly, the violence inherent in situations of conflict is not particularly conducive to meticulous respect for the principles and rules of IHL.

This does not mean that the progress made to date in the area of IHL is not commendable. No less than 100 States are now party to Additional Protocol I and 99 to Additional Protocol II. Moreover, the dissemination of IHL has become a standard practice and, in many cases, a recognized field of study, particularly among military and government personnel and National Red Cross and Red Crescent staff.

Despite these achievements, however, the implementation of IHL continues to be impeded by indifference, scepticism and ignorance. It is therefore important to determine how IHL's extensive legal resources can be used more effectively to overcome such obstacles, and how the relevant preventive measures and monitoring mechanisms can be brought to bear to ensure its more widespread implementation.

The International Review of the Red Cross *attempts to answer these important questions in the present and next issue in a series of articles focusing on various aspects of the implementation of IHL. The* Review *first deals with preventive measures, namely the measures taken by States at the national level in peacetime, i.e. before the provi-*

sions of IHL come into practical effect. Then it takes a look at monitoring mechanisms, in particular the International Fact-Finding Commission. Lastly, it examines the means for repressing breaches of IHL.

The implementation of IHL depends primarily on the initiative, goodwill — or good faith — of each State. The lawmakers have accomplished the difficult task of striking an acceptable balance between the principle of State sovereignty and humanitarian needs. In the first article of the series (pp. 105-133), ***Professor Gérard Niyungeko*** *reviews the rules of law that protect State sovereignty. Only brief mention is made of provisions that cannot be regarded as major obstacles to implementation, such as the possibility of denouncing the Conventions (in practice, humanitarian obligations have so far never been denounced) and the option of formulating reservations thereto. Closer scrutiny is given to the rules which delay or hamper implementation, which provide for the agreement or consent of the State, which reserve State security, which leave the State a wide margin of judgement and which reserve to the State certain exclusive powers, in particular with respect to the repression of breaches.*

In order to paint a balanced picture, Professor Niyungeko then turns to the rules that may be considered as direct or indirect derogations from the principle of State sovereignty. Under IHL the obligation not only to respect *but also* to ensure respect *for the Geneva Conventions and their Additional Protocols is binding both for States party to a conflict and for third States. The same principle applies to obligations undertaken by States to accept a monitoring mechanism in the form of a Protecting Power, to refrain from taking reprisals against protected persons and property and not to absolve themselves or any other State party of any liability in respect of breaches of IHL.*

In conclusion, the author finds that, despite the various "concessions" made to IHL, the principle of State sovereignty still places many obstacles in the way of implementation, particularly in the event of non-international armed conflicts, for which IHL provides no monitoring mechanism.

* * *

Respect for IHL by States depends largely on their adoption of adequate national legislation, incorporating the provisions of the IHL treaties, or their enactment of legislative, administrative or practical

measures to ensure full application of IHL. Resolution V of the 25th International Conference of the Red Cross appropriately reaffirms the duty of States to adopt national measures of implementation, to exchange information on those measures through the depositary State and to keep the ICRC informed of any legislative or other measures taken in respect of IHL, and requests the ICRC to gather and assess this information. It also invites National Red Cross and Red Crescent Societies to assist and co-operate in these efforts.

The ICRC, whose role in this respect is crucial, has spared no effort to remind States of their duty and to assist them in discharging their obligations. In 1988 and again in 1989 it wrote to that effect to the States party to the Geneva Conventions and also to the National Societies. The replies, as explained in the ICRC's ***Interim Report*** *(see pp. 134-139) show that too little has been done to adopt national legislation and practical measures for implementation. In addition, few opinions or suggestions have been offered as to how the ICRC might more effectively support States in their efforts to implement IHL. The ICRC therefore wrote again on 18 January 1991 to the recipients of the first letter to ask for further information enabling it to compile a comprehensive and well-documented report for submission to the forthcoming International Conference of the Red Cross and Red Crescent in November 1991.*

Progress has undoubtedly been made towards better implementation of IHL, but much still remains to be achieved.

Various aspects of implementation at the national level are discussed by ***Dieter Fleck*** *(Federal Republic of Germany) in his article on the problems and priorities of implementing IHL (see pp. 140-153). He points out that implementation is hindered by lack of motivation in peacetime, lack of knowledge and the complexity of the rules of law. He therefore considers that, although traditional legislative measures are important, greater emphasis should be placed on organizational and structural measures to be taken both in peacetime (such as setting up medical establishments and units in safe areas) and in wartime, the training of qualified personnel and the dissemination of IHL. He then gives a comprehensive overview of the measures taken by governmental authorities in Germany, and highlights the active role played by the German Red Cross.*

As a means of remedying the inadequate implementation of IHL, the author proposes setting long-term priorities, for example with respect to the identification of works and installations containing dangerous forces, the establishment of medical and security zones and the setting up of tracing services.

In view of the many problems attached to implementation and the great complexity and technical nature of various implementation measures, the author recommends that plans of action and lists of priorities be established through long-term joint efforts and continued international co-operation.

***Marc Offermans** (Belgium) in turn outlines what his country has done to promote implementation, focusing on the role of the Belgian Interdepartmental Commission for Humanitarian Law (see pp. 154-166). Set up in 1987 for the purpose of "drawing up a complete inventory of the measures to be taken" and "following up and co-ordinating the finalization of the texts required by the competent Ministries", the Commission stimulates the action of the Ministries concerned and monitors the application of the measures adopted. The author retraces the Commission's origins and describes its composition, tasks, working methods, working procedure and achievements so far.*

Emphasis is also placed on the need to appoint qualified personnel and legal advisers to the armed forces and to promote dissemination of IHL, a field in which the Belgium Red Cross plays a key role.

* * *

The second major theme dealt with in this issue of the Review *is the establishment of the International Fact-Finding Commission provided for in Article 90 of Additional Protocol I to "enquire into any facts alleged to be a grave breach as defined in the Conventions and [the said] Protocol or other serious violation of the Conventions or of [the said] Protocol" and to "facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and [the said] Protocol".*

*Captain **J. Ashley Roach** (United States of America) reviews in his article various other fact-finding mechanisms, then discusses the unique nature of the Commission provided for in Article 90, incorporating into his legal analysis numerous comments and suggestions (pp. 167-189). He describes in particular the role of the depositary State, the qualifications required of the candidates for election as members of the Commission and the electoral procedure itself. He then comments on the paragraphs of Article 90 relating to the Commission's organization (election of the President, rules of procedure) and competence.*

The author also explains the role of the Chamber of seven members set up to conduct enquiries and make ensuing recommendations. Lastly he touches on the Commission's internal rules and on various administrative and financial matters.

In her contribution on the same subject (pp. 190-207), ***Françoise Krill*** *(ICRC) describes the establishment of the Commission as a major advance for IHL: "The advantage of making it a standard practice to institute an enquiry is that such enquiries are not subject to the prior consent of the Parties concerned. Acceptance of the Commission's competence is given in principle, in peacetime, before there is any need to conduct an enquiry. Moreover, the fact that the Commission is a permanent institution is a considerable deterrent for Parties to a conflict which might be tempted to commit breaches of IHL".*

After reviewing the Commission's origins and describing how it works, the author concentrates on the ICRC's fact-finding role in general and in relation to Article 90. Although no such role is provided for in the Geneva Conventions, the ICRC has been asked on several occasions to take part in fact-finding efforts. A proposal was made at the Diplomatic Conference of 1974-1977 to entrust the ICRC with the task of administering the Commission. The ICRC indicated its willingness to accept that task provided it were precisely defined and clearly differentiated from its traditional protection and assistance activities.

The proposal was ultimately rejected by States in order to maintain a clear distinction between the respective mandates of the ICRC and the Commission and to avoid placing the ICRC in a position that might hamper the discharge of its duties. In the final analysis it is the complementary of the two bodies that is essential.

Now that at least (and meanwhile more than) twenty States have agreed to accept the competence of the Commission as provided for in Article 90 (see table, p. 210), the procedure for its establishment may begin. The ***depositary State*** *(see p. 208) has already announced various steps taken to that effect, in particular the convening of a meeting for representatives of the States that have accepted the terms of Article 90 in order to elect the Commission's fifteen members.*

* * *

The Review *will conclude this series of articles on the implementation of IHL in the next issue by examining the means of repressing*

breaches of the law.[1] *It trusts that the series will provide readers with useful reference material, particularly in view of the forthcoming 26th International Conference of the Red Cross and Red Crescent, where these matters of undeniable importance will be discussed.*

The Review

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[1] For further information, see the report of the Regional Seminar on the Implementation of IHL, organized in Sofia in September 1990 by the ICRC in co-operation with the Bulgarian Red Cross and the International Institute of Humanitarian Law (pp. 223-233). This Seminar gave representatives and experts of eleven European countries a useful opportunity to exchange views and share experience in this field. See also the article on the XVth Round Table of the International Institute of Humanitarian Law (San Remo, 4-8 September 1990) in *IRRC*, No. 280, January-February 1991, pp. 57-68, from p. 61-62, and the book review on the International Symposium on the National Implementation of International Humanitarian Law (Bad Homburg, 17-19 June 1988), p. 238.

The implementation of international humanitarian law and the principle of State sovereignty

by Gérard Niyungeko

INTRODUCTION

Before stating the terms of the problem we intend to examine, it is necessary first of all to explain what is meant by "the imperative necessity of implementing international humanitarian law".

1. The imperative necessity of implementing international humanitarian law

As is well known, international humanitarian law is the set of legal rules which States are obliged to respect and which are designed to protect the victims of international or non-international armed conflicts.

It is essentially contained in the four Geneva Conventions of 12 August 1949 on the amelioration of the condition of the wounded and sick in armed forces in the field, the amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea, the treatment of prisoners of war, and the protection of civilian persons in time of war, respectively.

These Conventions have been developed and supplemented by two Additional Protocols, adopted on 8 June 1977, the first of which relates to the protection of the victims of international armed conflicts and the second to the protection of the victims of non-international armed conflicts.

Implementation of international humanitarian law comprises respect for its provisions, i.e., its effective application, the supervision of that application and the repression of any violations.[1]

In this connection, it must be stressed that, given the purpose of international humanitarian law, its implementation is a matter of utmost importance. Of course, no legal order can have any meaning if its rules are not effectively applied when the necessity arises, but this observation is particularly relevant in the case of international humanitarian law, which is applied in the context of war, a context where the lives of human beings are constantly at risk. If it is not effectively applied in situations of conflict, the damage done is usually beyond repair. The mechanisms of punitive sanctions and reparations cannot change the tragic nature of the situation, but they can sometimes prevent it from continuing.

In any case, the imperative necessity of implementing international humanitarian law was clearly a major concern of the authors of the Geneva Conventions and Additional Protocols. This is evidenced in particular by some rules contained in these instruments which are not found in ordinary treaty law.

There is, first of all, the rule set out in Article 1 common to the Conventions and in Article 1, para. 1 of Protocol I, which specifies: *"The High Contracting Parties undertake to respect (...) the present Convention* [respectively Protocol] *in all circumstances"*. As many commentators[2] have pointed out, this provision may at first sight seem superfluous since it adds nothing to the general principle of the law of treaties, *pacta sunt servanda*, set out in Article 26 of the Vienna Convention on the Law of Treaties of 23 May 1969: *"Every treaty in force is binding upon the parties to it* and *must be performed by them in good faith"*.[3] In fact, it seems that the authors of these texts

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[1] Sassòli, Marco, "La mise en œuvre du droit international humanitaire et la répression de ses violations", International Seminar on the Law of Armed Conflicts and Humanitarian Action, Kinshasa, 6-8 January 1988, p. 1.

[2] See, *inter alia*, Sandoz, Yves, "Implementing international humanitarian law", *International Dimensions of Humanitarian Law*, Paris, UNESCO; Henry Dunant Institute, Geneva, Martinus Nijhoff Publishers, 1988, pp. 261-262; *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Editors: Yves Sandoz, Christophe Swinarski, Bruno Zimmermann, Martinus Nijhoff Publishers, ICRC, Geneva, 1987, pp. 31-35 (hereinafter *Commentary on the Additional Protocols*).

[3] Author's emphasis.

wished both to re-state the rule and to emphasize it, thereby demonstrating their insistence on the effective implementation of these instruments.[4]

Another rule, this time of a technical nature, provides that each of the Geneva Conventions and each of the Protocols *"shall come into force six months after not less than two instruments of ratification have been deposited."*[5] The fact that a treaty intended to be universal is satisfied with two instruments of ratification is in itself an unmistakable indication of the importance attached to applying it as soon as possible. As the *Commentary on the Additional Protocols* emphasizes: *"This meant that it* [Protocol I] *would quickly become applicable, at least between the Contracting States. Moreover, it could accelerate the rate of ratifications and accessions".*[6]

Furthermore, mention could be made of the provisions which stipulate that: *"The situations provided for in Articles 2 and 3 shall give immediate effect to ratifications deposited and accessions notified by the Parties to the conflict before or after the beginning of hostilities or occupation."*[7] The situations in question are those of international and non-international armed conflicts. Whereas normally the Conventions come into force six months after the instruments of ratification or accession have been deposited[8], when an armed conflict involves a Party for which that period has not yet elapsed, the texts will apply to that Party immediately, regardless of that rule.

All these specific rules show that the question of the implementation of international humanitarian law is in a class by itself.

2. The problem at issue

Has the imperative necessity of implementing international humanitarian law eroded to some extent the principle of State sovereignty? This is basically the question being asked in this article.

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[4] The Geneva Conventions and the Additional Protocols contain other provisions of similar purport: e.g. Article 45 of the First Convention, Article 46 of the Second Convention and Article 80 of Additional Protocol I.

[5] See Article 58-57-138-153 common to the Conventions, Article 95, para. 1 of Additional Protocol I and Article 23, para. 1 of Additional Protocol II.

[6] *Op. cit.*, p. 1080, para. 3730.

[7] See Article 62-61-141-157 common to the Conventions; *Commentary on the Additional Protocols*, p. 1081, paras 3737-3739.

[8] See note 5 above.

Let us say straight away, to avoid any misunderstanding, that the fact that States are sovereign does not in itself constitute a legitimate obstacle to the implementation of international law in general and international humanitarian law in particular. In other words, States could not invoke their sovereignty to avoid honouring their international legal commitments, such as treaty commitments. The principle of State sovereignty does not in fact mean that States are not subject to international law. A State which, in the exercise of its sovereignty, has contracted an international obligation cannot subsequently invoke its sovereignty to resist the implementation of that obligation.[9] A State which behaved in that way would definitely be in violation of international law and might well incur international responsibility.

Consequently, that problem— which has already been settled in the theory of international law— is not the one which we are considering here.

We should like to take up two points concerning the relationship between the implementation of international humanitarian law and the principle of State sovereignty.

First, there is the possible existence in international humanitarian law or in general international law of rules which reserve State sovereignty and thus erect potential obstacles to the implementation of international humanitarian law. When a State relies on such rules so as not to apply humanitarian conventions, it does not necessarily violate international humanitarian law.

Second, the question arises whether, through the use of other rules or principles specifically applicable in international humanitarian law, the sovereignty principle has not, in a way, made "concessions", thus facilitating the implementation of this law.

Hence we have the two following parts:

Part I : Rules which protect State sovereignty, and

Part II: "Concessions" by the principle of State sovereignty.

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[9] In its ruling on the *S.S. Wimbledon* case, the Permanent Court of Justice took a similar view: "The Court declines to see, in the conclusion of any treaty by which a State undertakes to perform or refrain from performing a particular act, an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it causes them to be exercised in a certain way. Nevertheless, the right of entering into international engagements is an attribute of State sovereignty." P.C.I.J., *Ser. A*, No. 1, 17 August 1923.

PART I:

RULES WHICH PROTECT STATE SOVEREIGNTY

These are rules incorporated into the legal norms of international humanitarian law which reserve, i.e. protect, State sovereignty.

The norms of humanitarian law which include such rules bear in themselves the virtual limits of their implementation. We shall examine some of these rules and try in each case to verify whether they constitute genuine obstacles to the effective application of international humanitarian law.

The question is worth asking whatever kind of rules they are; whether rules regarding the denunciation of humanitarian conventions or the formulation of reservations concerning them, rules which provide for the agreement or consent of the State, rules which reserve the security of the State and military necessities, rules which leave a wide margin of judgement to the State or rules which reserve certain powers to the State.

We shall then examine the problem in relation to the particular case of non-international armed conflicts.

1. The possibility of denouncing the Geneva Conventions and their Additional Protocols

"Denunciation (or withdrawal) is a procedural act carried out unilaterally by the competent authorities of States parties which wish to free themselves from their commitments".[10]

It is clear that a convention which provides for its denunciation by the States parties reserves their sovereignty.[11] By granting them the option of freeing themselves from their commitments, it allows them to regain their liberty.

In the case of the Geneva Conventions and their Additional Protocols, provision is made for the possibility of such a denunciation. Thus Article 63-62-142-158 common to the Conventions provides in its first paragraph: "Each of the High Contracting Parties shall be at liberty to

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[10] See Nguyen Quoc, Dinh, Daillier, Patrick and Pellet, Alain, *Droit international public*, 3e éd., Paris, LGDJ, 1987, p. 277. Denunciation is governed by Article 56 of the Vienna Convention on the Law of Treaties.

[11] Concerning denunciation, see Torrelli, Maurice, *Le droit international humanitaire*, Paris, PUF, 1985, p. 90. The author speaks of "the last rampart of sovereignty".

denounce the present Convention". The Protocols contain similar provisions.[12]

Nevertheless, this option is hedged about with important restrictions. The first is that *"a denunciation of which notification has been made at a time when the denouncing Power is involved in a conflict shall not take effect until peace has been concluded, and until after operations connected with the release and repatriation of the persons protected by the present Convention have been terminated"*.[13]

This is designed to prevent a State from unilaterally freeing itself from its commitments under humanitarian law just when these commitments have to be applied. This restriction is crucial for the implementation of humanitarian law since without it the law would become meaningless. What, indeed, would be its point if, at the outbreak or during the course of hostilities, the parties to the conflict could purely and simply repudiate it?

The second restriction is that the denunciation *"shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience"*.[14]

This rule is based on the celebrated clause known as the Martens clause, from the name of the Russian diplomat who suggested it, which states that *"the principles of international law apply in all armed conflicts, whether or not a particular case is provided for by treaty law, and whether or not the relevant treaty law binds as such the Parties to the conflict"*.[15] In other words, a State party which has made a legally valid denunciation of a humanitarian convention would nevertheless be bound by non-conventional humanitarian rules and principles. This means that, if it denounces such a convention, a State will not necessarily find itself in a humanitarian-law vacuum where it can do anything it likes.

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[12] See Article 99 of Additional Protocol I and Article 25 of Additional Protocol II.

[13] Paragraph 3 of Article 63-62-142-158 common to the Conventions. See also Article 99 of Additional Protocol I and Article 25 of Additional Protocol II.

[14] Paragraph 4 of Article 63-62-142-158 common to the Conventions. See also Article 1, para. 2 of Additional Protocol I and the fourth preambular paragraph of Additional Protocol II.

[15] *Commentary on the Additional Protocols*, p. 39, para. 56.

What is such a circumscribed right of denunciation really worth? It is hardly an exaggeration to say that it is no longer worth very much. Commenting on the provisions relating to denunciation in the Geneva Conventions, Professor Balanda notes: *"This is tantamount to recognizing in other terms that, as a result of these various types of requirements, none of the provisions of the Geneva Conventions of 12 August 1949, designed to protect the human person, can be denounced".*[16]

In practice, no State has ever denounced the Conventions and the relevant provisions are thus still theoretical.[17] This situation appears quite normal, since it is difficult to imagine that humanitarian obligations could be denounced.[18]

We must conclude, therefore, that the option of denouncing the Geneva Conventions and the Additional Protocols, as limited by the texts themselves, is not a real obstacle to the implementation of treaties of international humanitarian law.

2. Reservations

According to Article 2, paragraph (d) of the Vienna Convention on the Law of Treaties:

"'[R]eservation' means a unilateral statement, however phrased or named, made by a State or by an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that organization".

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[16] Balanda, Mikuin Leliel, "Le droit de Genève et son apport au droit international", International Seminar on the Law of Armed Conflicts and Humanitarian Action, Kinshasa, 6-8 January 1988, p. 21.

[17] *Commentary on the Additional Protocols*, p. 1108, para. 3835.

[18] This is the explanation given by the *Commentary on the Additional Protocols* of the fact that the question was nevertheless included: "The idea that a State could free itself from the obligations imposed upon it by humanitarian law by means of a denunciation might seem to be incompatible with the very nature of that law.

In view of the uncertainty of customary law and legal writings on the possibilities of denouncing a treaty when it does not have a specific clause for this purpose, it seemed preferable, already in the case of the Conventions to provide for the right to denounce them, at the same time making this right subject to certain restrictions and adding a reminder that some obligations continue to exist in all circumstances." (p. 1108, paras 3833-3834).

Neither the Geneva Conventions nor the Additional Protocols have any clauses concerning reservations.[19]

When a treaty is silent regarding the possibility of the States parties to enter reservations, the Vienna Convention on the Law of Treaties offers the following possibility (Article 19):

"A State or an international organization may, when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, formulate a reservation unless:

(...)

(c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty".[20]

It is thus the criterion of compatibility with the object and purpose of the treaty which gives us the key to the problem.

The absence of any clauses concerning reservations did not prevent the States parties to the Geneva Conventions from making them.

From his study on the matter, Pilloud concludes that some 21 States made valid reservations, concerning a limited number of provisions.[21]

This is not the place to re-examine all the reservations entered to the Geneva Conventions. It will be sufficient to look at a few of them, by way of illustration, so as to get an idea of their compatibility with the object and purpose of the humanitarian Conventions and, more generally, with humanitarian protective rules.

We may begin by two examples of reservations made at the time of signature but withdrawn on ratification, undoubtedly because they were obviously contrary to the object and purpose of the Conventions.

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[19] As Torrelli (*op. cit.*, p. 89) reports: "The draft of ICRC Protocol I provided for a procedure giving details of the reservations that could be entered. This proposal was not adopted largely because of the fact, pointed out by Poland, that the reservation procedure had already been fixed by Articles 19 to 23 of the Vienna Convention on the Law of Treaties. However, Egypt, on the contrary, wanted all reservations prohibited to preserve the balance of the compromises reached, since the reservation machinery could enable each State to undo the progress achieved by setting aside the solutions which displeased it".

[20] The Convention adopted the position of the International Court of Justice in the case of *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, advisory opinion of 28 May 1951.

[21] Pilloud, Claude, "Reservations to the Geneva Conventions of 1949", offprint from the *International Review of the Red Cross*, Nos. 180-181, March and April 1976, p. 43. The provisions in question are Article 53 of the First Convention, Articles 85, 87, 99, 100 and 101 of the Third Convention and Articles 44 and 68 of the Fourth Convention.

Such was the case with Portugal's reservation to Article 3 common to the Conventions (conflicts not of an international character), which reads in part *"Portugal reserves the right not to apply the provisions of Article 3, in so far as they may be contrary to the provisions of Portuguese law in all territories subject to her sovereignty in any part of the world".*[22]

As Pilloud points out, such a reservation would "deprive of all meaning an article forming an important part of an international agreement".[23]

Another example of the same kind is the reservation that Spain made to Articles 82 ff. of the Convention relative to the Treatment of Prisoners of War. It was expressed in the following terms: *"In matters regarding procedural guarantees and penal and disciplinary sanctions, Spain will grant prisoners of war the same treatment as is provided by her legislation for members of her own national forces".*[24] As Pilloud comments once again, *"this reservation amounted to depriving the chapter on penal and disciplinary sanctions of all meaning".*[25]

These few cases of statements ultimately withdrawn by their authors give an idea of the kind of reservations that are incompatible with the object and purpose of humanitarian conventions, and thus inadmissible.

But what is the position now of the reservations which actually came into force?

Here again, we shall limit ourselves to commenting on two examples, the reservations made to Article 85 of the Third Geneva Convention and those made to Article 68 of the Fourth Geneva Convention.

Article 85 of the Third Convention provides as follows: *"Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention".*

A number of States, for the most part communist, entered similar reservations. The reservation made by the USSR was explained in the following way:

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[22] *Ibid.*, p. 12.
[23] *Ibid.*, p. 13.
[24] *Ibid.*, p. 26.
[25] *Ibid.*

"[T]he reservation (...) means that prisoners of war who have been convicted under Soviet law for war crimes or crimes against humanity must be subject to the conditions applied in the USSR to all other persons undergoing punishment after conviction by the courts. Consequently, this category of persons does not benefit from the protection of the Convention once the sentence has become legally enforceable.

With regard to persons sentenced to terms of imprisonment, the protection of the Convention will only apply again after the sentence has been served. From that moment onwards, these persons will have the right to repatriation in the conditions laid down by the Convention".[26]

Since this reservation does not affect the legal guarantees provided for prisoners of war by the Convention, prior to their conviction for war crimes or crimes against humanity, it does not seem justified to regard it as contrary to the object and purpose of the said Convention.[27]

On the other hand, the reservation entered in 1973 by the Provisional Revolutionary Government of the Republic of South Viet Nam concerning the same article drew objections from certain States[28] to the effect that it was directed against the object and purpose of the Convention.

The reservation reads as follows:

"The Provisional Revolutionary Government of the Republic of South Vietnam declares that prisoners of war prosecuted and sentenced for crimes of aggression, crimes of genocide or for war crimes, crimes against humanity pursuant to the principles laid down by the Nuremberg Court of Justice, shall not receive the benefit of the provisions of this Convention".[29]

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[26] Note from the Ministry of Foreign Affairs of the USSR of 26 May 1955, Pilloud, *op. cit.*, p. 29. The other States entering reservations on this point were: Albania, the German Democratic Republic, the Byelorussian SSR, Bulgaria, the People's Republic of China, the Democratic People's Republic of Korea, Hungary, Poland, Romania, Czechoslovakia, the Ukrainian SSR and the People's Republic of Viet Nam (*Ibid.*, p. 27).

[27] According to Pilloud (*op. cit.*, p. 33): "It should be pointed out that the Geneva Conventions, particularly the Third, do not raise any obstacle to the trial of prisoners of war for war crimes, nor to their sentence by the courts of the Detaining Power should they be found guilty. All the Third Convention lays down is that the enemy prisoner accused of war crimes shall be given the benefit of certain legal guarantees."

[28] For example, the United States and the United Kingdom (Pilloud, *op. cit.*, p. 37).

[29] Pilloud, *op. cit.*, p. 35.

Apart from the fact that this reservation adds to the list of the categories of crimes, it is not certain that its scope and significance differ from those of the reservation entered by the USSR.

As for Article 68 of the Fourth Convention, its second paragraph reads:

"The penal provisions promulgated by the Occupying Power in accordance with Articles 64 and 65 may impose the death penalty on a protected person only in cases where the person is guilty of espionage, of serious acts of sabotage against the military installations of the Occupying Power or of intentional offences which have caused the death of one or more persons, provided that such offences were punishable by death under the law of the occupied territory in force before the occupation began".

Several States have entered reservations to this paragraph, among them the United States of America, which declared that:

"The United States reserve the right to impose the death penalty in accordance with the provisions of Article 68, paragraph 2, without regard to whether the offences referred to therein are punishable by death under the law of the occupied territory at the time the occupation begins".[30]

Is such a reservation contrary to the object and purpose of the Convention? In so far as it seriously worsens the situation of the persons protected by the Convention, it can be regarded as incompatible with its object, at least in theory. In practice, however, as Pilloud comments: "There is no country, it appears, which in war-time does not have laws punishing with death the crimes listed in Article 68, especially when they are committed against military personnel or military property".[31]

Moreover, we should point out that, of the nine States which entered that reservation, four withdrew it, either on ratification (Argentina and Canada) or subsequently (United Kingdom and Australia).[32]

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[30] *Ibid.*, p. 41. In 1976, this reservation was still valid for four other States: the Republic of Korea, the Netherlands, New Zealand and Pakistan.

[31] *Ibid.*, p. 42.

[32] *Ibid.*, p. 41.

What shall we conclude about this point? Knowing that the reservations concerning Article 85 of the Third Convention and Article 68 of the Fourth Convention are probably the most important[33], it is clear that the reservations made to the Geneva Conventions have a limited scope.

For all that, we cannot help wondering whether, as a principle, the compatibility of the procedure of reservations, which safeguards State sovereignty[34], is compatible with the very object of the Geneva Conventions, namely, the protection of the victims of armed conflicts.

It would undoubtedly have been better if the texts of the Conventions had forbidden any reservations, but States are so touchy about their sovereignty that they prefer to retain the possibility of making reservations, even though they are aware that they will not take up the option.

In the future, an attempt should be made to persuade the reserving States to withdraw their reservations.[35] The attitude of the States party to the Additional Protocols with regard to reservations thereto could be an indication of their possible evolution on the question.[36]

In any case, the existing reservations to the Geneva Conventions do not constitute a major obstacle to the latter's implementation.

3. Rules providing for State agreement or consent

If the wording of a rule provides for the agreement or consent of the State committing itself, there is necessarily a reservation of the State's sovereignty, in the sense that the effective application of the rule depends on the will of the State.

We have not counted all the rules in the Geneva Conventions and Additional Protocols which include such a clause. Instead, we shall just give a few illustrations to show how the implementation of these rules can be hampered by the reservation of sovereignty implied by the need for the State's agreement.

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[33] *Ibid.*, p. 44.

[34] See Torrelli, *op. cit.*, p. 88: "The classic procedures for defending sovereignty in the law of treaties make it possible, first of all, for States to enter *reservations*".

[35] In this connection, see Pilloud, *op. cit.*, p. 44.

[36] For this purpose, it would be necessary to see the number and scope of the reservations made to the Additional Protocols. As of 31 December 1990, 99 States were party to Protocol I and 89 to Protocol II.

(a) Acceptance of the Protecting Powers, their substitutes and their representatives and delegates

The Protecting Power is a Power responsible for safeguarding the interests of the Parties to the conflict and of their nationals present in enemy territory.[37] Article 5, paragraph 2 of Additional Protocol I provides, incidentally, that the Protecting Power designated by a party to the conflict must be accepted by the other.

A substitute for the Protecting Power is either a neutral State or a humanitarian or other organization, which offers all guarantees of impartiality and efficacy, such as the International Committee of the Red Cross, which, in the absence of a Protecting Power, is appointed by the Parties to the conflict to undertake the functions entrusted to the latter.[38] It emerges from the relevant provisions that the substitutes for the Protecting Powers must be accepted by the Parties to the conflict.[39]

The same is true of the delegates of the Protecting Powers and of their substitutes who, in order to assume their functions, must first be approved by the Power with which they are to carry out their duties.[40]

In all these examples, the important point to bring out is that the implementation of such rules is subject to the will of the States parties and that the dependence is itself consistent with the Conventions. This is a reservation of the sovereignty of the States which can paralyse the application of the machinery for implementing international humanitarian law.

(b) The agreement concerning the settlement of disputes

The procedures for the settlement of disputes provided for by the Geneva Conventions and Protocol I also contain some elements requiring the consent of the States concerned for their application.

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[37] Verri, Pietro, *Dictionnaire du droit international des conflits armés,* International Committee of the Red Cross, Geneva, 1988, p. 102.

[38] See Article 10-10-10-11 common to the Conventions; Article 5, para. 4 of Additional Protocol I.

[39] Article 5, para. 4 of Additional Protocol I clearly states: "The functioning of such a substitute is subject to the consent of the Parties to the conflict" The only exception seems to be the obligation imposed on the Parties to the conflict to accept the offer made by the ICRC or by a similar organization to take on the humanitarian duties of the Conventions, in the absence of the Protecting Power or other substitute (Article 10-10-10-11, para. 3 of the Conventions and Article 5, para. 4 of Protocol I) but, even on this assumption, the reservation of consent to the exercise of the duties remains.

[40] See, for example, Article 8-8-8-9, para. 1 and Article 9-9-9-10 common to the Conventions.

Thus paragraphs 1 and 2 of Article 52-53-132-149 common to the Conventions stipulate:

"At the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention.

If agreement has not been reached concerning the procedure for the enquiry, the Parties should agree on the choice of an umpire who will decide upon the procedure to be followed".

Whether it is a question of the enquiry or of the possible arbitration, the success of the procedure will thus depend on the agreement of the parties concerned. In other words, if one of the parties obstructs it, for one reason or another, the mechanism for the settlement of disputes cannot be immediately set in motion.[41]

Additional Protocol I, which breaks new ground by providing for the establishment of an International Fact-Finding Commission, nevertheless still reserves the sovereignty of the States in the operation of the Commission in question. It is apparent from Article 90 of the Protocol that:

— The Commission will be competent only with respect to the States parties which have made a declaration to that effect (para. 2 (a));

— It will not be established until at least 20 High Contracting Parties have agreed to accept its competence (para. 1 (b));

— In certain situations, the Commission will institute an enquiry only with the consent of the other Party or Parties concerned;[42] *and*

— The members of the Commission instructed to examine a situation must be accepted by the Parties.

— All these clauses are clearly such that they can delay the establishment of the Commission and hinder its operation.

It must be said that, in the matter of the settlement of disputes, the Geneva Conventions and the Additional Protocols have simply kept to the classical machinery dominated by the principle of consensus whereby States cannot be subjected to a method of settlement without their prior or *ad hoc* consent.

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[41] Sandoz (*op. cit.*, p. 278) observes in this connection: "This procedure does however require agreement at least on the umpire, which is probably one reason why it has never been successful."

[42] Nevertheless, in the case of a grave breach as defined in the Geneva Conventions and Protocol I or of other serious violation of these instruments, it appears that the Commission will be able to institute an enquiry, even without the agreement of the Party complained of (para. 2 (c)). On this point see Sandoz, *op. cit.*, p. 278.

4. Rules which reserve State security and military necessity

A number of rules in the Geneva Conventions contain a clause reserving State security or military necessity.

Such clauses — of which a few examples will be given below — exempt the States parties from applying the substantive rules they contain on the grounds of State security or military necessity.

Needless to say, these clauses are intended to protect the State and, in particular, one of its constituent elements: sovereignty.

This is an almost "natural" reservation but one which can nevertheless damage respect for international humanitarian law since the State benefiting from the derogation unilaterally assesses the danger to its security or the military requirements in question.

We can cite, among other examples, para. 3 of Article 8-8-8-9 common to the Conventions, which states:

"They (the representatives or delegates of the Protecting Powers) *shall, in particular, take account of the imperative necessities of security of the State wherein they carry out their duties. Their activities shall only be restricted, as an exceptional and temporary measure, when this is rendered necessary by imperative military necessities".*[43]

Or again, Article 30, para. 2 of the Fourth Convention which reads:

"These several organizations (Protecting Powers, ICRC, National Red Cross and Red Crescent Societies) *shall be granted all facilities for that purpose by the authorities, within the bounds set by military or security considerations".*[44]

5. Rules which leave a wide margin of judgement to the State

We may adopt a similar line of reasoning with respect to certain rules of the Geneva Conventions and Protocols which are so worded

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[43] The last sentence of this paragraph, however, does not appear in the text of the Third and Fourth Conventions.

[44] In this connection, see also Article 126, para. 2 of the Third Convention; Articles 5, 35 para. 3, and 74 para. 1, of the Fourth Convention and Articles 64, para. 1, and 71, para. 4, of Protocol I.

as to leave a wide margin of judgement to the State concerning the extent of its obligation.

For example, para. 2 of Article 8-8-8-9 common to the Conventions states that: *"The Parties to the conflict shall facilitate, to the greatest extent possible, the task of the representatives or delegates of the Protecting Powers".*[45]

Similarly, Article 74 of the Third Convention provides, in its last paragraph: *"The High Contracting Parties shall endeavour to reduce, as far as possible, the rates charged for telegrams sent by prisoners of war, or addressed to them".*[46]

Let us also quote Article 5, para. 4, of Protocol I which uses another formula: *"every effort shall be made by the Parties to the conflict to facilitate the operations of the substitute in the performance of its tasks under the Conventions and this Protocol".*[47]

Article 88, para. 2, of Protocol I states in a very similar way that: *"when circumstances permit, the High Contracting Parties shall co-operate in the matter of extradition".*[48]

The expressions "to the greatest extent possible", "as far as possible", "every effort shall be made", "when circumstances permit", and others of the same kind are so vague that it may be wondered to what extent they really bind any State. What is certain is that States can shelter behind this indefinite formulation so as not to apply the Conventions and Protocols as they should do.

Once again these are expressions which protect the sovereignty of States and can affect the implementation of humanitarian law.

6. Rules which reserve certain powers to the State

The question which arises here is that of determining whether the Geneva Conventions and their Additional Protocols have reserved certain powers to the States in the matter of the protection of the victims of armed conflicts. In other words, whether there is a reserved area in humanitarian international law.

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[45] Author's emphasis. See also, for instance, Article 81, para. 3, of Protocol I.

[46] Author's emphasis. See also, for instance, Article 30, para. 3, of the Fourth Convention and Article 81, para. 4, of Protocol I.

[47] Author's emphasis.

[48] Author's emphasis.

We may recall that, in the theory of general international law, the reserved area is that of *"State activities where the power of the State is not bound by international law"*.[49] According to Nguyen Quoc *et al.*: *"The concept of the reserved area is only a 'historical residue' of the absolute sovereignty of the monarchical era. It is still intimately connected with the concept of sovereignty"*.[50]

When this question comes up in humanitarian international law, it is usually in connection with the problem of repressing breaches of the law, which is generally said to be a national matter, in the absence of an appropriate international criminal court.

We shall limit ourselves to this example and see what the situation is exactly, distinguishing between what are the termed grave breaches and other breaches.

(a) **Repression of grave breaches**

The list of grave breaches is set out in Article 50-51-130-147 common to the Conventions, supplemented by Article 11, para. 4, and 85, paras. 3 and 4, of Protocol I.

As for their repression, Article 49-50-129-146 common to the Conventions, provides in its first and second paragraphs:

"The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention (...).

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches (...). It may also, if it prefers (...), hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie *case".*

It follows from this text that the principle of repression itself is not part of the reserved area of States. Their competence in the matter is restricted since, by the terms of the Conventions, they are required to punish persons committing breaches. Failing this, and in application of the principle *aut dedere aut judicare*, they are obliged

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[49] This is a definition by the Institute of International Law (*Annuaire de l'IDI*, 1954, Vol. 45-II, p. 292), quoted by Nguyen Quoc *et al.*, *op. cit.*, p. 397.

[50] *Ibid.*, p. 396. The theory of the reserved area has been positively recognized in Article 2, para. 7, of the United Nations Charter.

to extradite them to a State party which wishes to try them. Furthermore, it should not be forgotten that the determination of the breaches is international, not national. In addition, the obligation to punish persons committing grave breaches is absolute, and the parties could not relieve themselves of their responsibilities in that respect.[51]

On the other hand, it appears that fixing the penalties for these breaches falls within the States' exclusive competence. And this is not necessarily without significance, for certain States might provide for penalties that are less severe than those imposed by others. Now, in domestic law and international law alike, the severity of the penalty may play a major dissuasive role which would be lacking in the case of an insignificant penalty thus reducing the chances of ensuring respect for the "hard core" of international humanitarian law.

It must, however, be said that it would be very difficult to draw up an international schedule of penalties. Moreover, even on the assumption that the penalties for grave breaches are determined nationally, it appears that the principle of the execution in good faith of international treaties (aforementioned Article 26 of the Vienna Convention on the Law of Treaties) would forbid the States parties to apply excessively light penalties for incidents regarded by everyone as grave. This, when all is said and done, puts into perspective the fact that this subject comes under the reserved area of States and reduces the consequences that could stem from it for the implementation of the relevant rules.

(b) **The repression of other breaches**

The above-mentioned Article 49-50-129-146 common to the Geneva Conventions provides in its third paragraph as follows:

"Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches".

But what is the meaning of the word "suppression"? According to the *Commentary on the Additional Protocols*:

"The term suppress ... should be understood in a broad sense: literally of course this means putting an end to such conduct; depending on its gravity and the circumstances, such conduct can

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[51] See Article 51-52-131-148 common to the Geneva Conventions.

and should lead to administrative, disciplinary or even penal sanctions — in accordance with the general principle that every punishment should be proportional to the severity of the breach".[52]

Even if we interpret the word in the widest sense, it is difficult to find in it a definite basis for an obligation to repress, in the penal sense of the word. States might be able to maintain that this provision, unlike the preceding ones, does not oblige them to repress breaches of the Conventions other than grave breaches. If this were so, it would be necessary to conclude that the matter belongs to the area reserved to States, with the consequence that, in some States, "ordinary" breaches would not be punished as criminal acts,[53] and this could affect the law of Geneva and its implementation.

This is likewise true, and with greater reason, of the fixing of the penalties applicable to these breaches, in the States that punish them. The obligation to repress by disciplinary means may, on the other hand, stem from the general provisions concerning the implementation of international humanitarian law, particularly Article 1 common to the Geneva Conventions.

7. The principle of State sovereignty and the special situation of the implementation of international humanitarian law in non-international armed conflicts

Non-international armed conflicts are governed by Article 3 common to the Geneva Conventions and by Additional Protocol II, which applies to armed conflicts *"not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol".* The conflicts to which Protocol II

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[52] *Commentary on the Additional Protocols*, p. 975, para. 3402.

[53] Sandoz (*op. cit.*, p. 276) notes incidentally:
"It [Article 86, para. 2 of Protocol I] cannot however *impose* sanctions where only the Contracting Parties are competent to do so, that is, in cases of breaches, other than grave breaches, of the Conventions or Protocol I."

is applicable are generally more intense than those governed solely by Article 3 common to the Geneva Conventions.[54]

The peculiarity of legal provisions governing these conflicts as compared with those applicable to international armed conflicts lies, *inter alia*, in the fact that there are no breaches described as grave, no system of Protecting Powers and no enquiry procedure.[55]

Since the conflict involves only one Contracting Party, the principle of State sovereignty "regains all its rights", or almost, if we may use the expression.

It is therefore not surprising that Protocol II should contain an article which, in a way, protects State sovereignty against international humanitarian law. Article 3, entitled "Non-intervention", provides as follows:

"1. Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.

2. Nothing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs".

As one author points out, *"the reaffirmation of sovereignty is thus a striking one".*[56]

The sole restriction on State sovereignty expressed in this rule seems to be the reference to "legitimate means" which are the only ones that may be used.[57] But since it is the State itself which assesses the legitimacy of the means, this restriction is very relative.

It remains true, nevertheless, that a State which has acceded to Protocol II is bound to respect the rules it contains, in keeping with

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[54] See *Commentary on the Additional Protocols*, p. 1350, para. 4457.

[55] Sandoz, *op. cit.*, p. 280. The ICRC may, nevertheless, offer its services to the parties to the conflict (Article 3 common to the Conventions) but the latter need not accept them. In practice, however, ICRC activities are just as extensive as in international conflicts (*Ibid.*).

[56] Torrelli, *op. cit.*, p. 94.

[57] From this the *Commentary on the Additional Protocols* (p. 1387, para. 4501) deduces that "the imperative needs of State security may not be invoked to justify breaches of the rules of the Protocol". Here again, it is necessary to agree on what is meant by "imperative needs of State security".

general international law. As the *Commentary on the Additional Protocols* observes:

"In ratifying or acceding to the Protocol, a State accepts its terms by the unfettered exercise of its sovereign powers. Consequently, the obligation to respect the rules contained in it cannot later be considered as an infringement of its sovereignty, as the government's freedom of action is limited by the obligations it has itself freely agreed to".[58]

To conclude, what accentuates the peculiarity of the legal régime of non-international conflicts is less the reaffirmation of State sovereignty, which no one had forgotten, than the resultant absence of outside mechanisms to monitor the State's compliance with humanitarian law. It is in this respect that it seems to us that the sovereignty principle constitutes a hindrance to the effective application of this law.

Whatever obstacles the principle of State sovereignty puts in the way of the implementation of international humanitarian law, and we have by no means exhausted them[59], we must now consider whether this same principle has not made some "concessions" to humanitarian international law and retreated somewhat, at least in comparison with classical international law.

PART II

"CONCESSIONS" MADE BY THE PRINCIPLE OF STATE SOVEREIGNTY

The question here is whether, in view of its specific character and the imperative necessity of implementing it, international humanitarian law does not contain some special rules or principles which, when compared with the classical principle of State sovereignty, reveal some direct or indirect derogations therefrom.

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[58] *Ibid.*

[59] We might also have mentioned rules of general international law, such as those on the States' unilateral interpretation and assessment, which are not always calculated to facilitate the implementation of international law, including humanitarian law.
On this subject, see, for instance, Torrelli, *op. cit.*, pp. 89-90.

We are thinking, in particular, of the acceptance by the State of outside supervision of the application of the Geneva Conventions and their Additional Protocols, of the ban on reprisals against protected persons and property and of the fact that one State cannot exonerate another from its responsibility for grave breaches of the Conventions and Protocols.

1. Acceptance by the State of outside supervision

We must understand, first of all, that it is one thing for a State to enter into an international legal commitment and quite another for it to accept outside supervision of the way in which it respects and applies that commitment. The two do not necessarily go hand in hand and many international conventions do not provide for such acceptance.

States can thus content themselves with contracting international obligations without setting up any supervisory mechanism, and relying, when it comes to violations of these obligations, on the traditional mechanisms of international responsibility, whose function is essentially reparative.

Within the framework of international humanitarian law and in view of the context in which it has to be applied, it was difficult to stop there[60]; it is undoubtedly because of the specific nature of this law that the States which drew up the Geneva Conventions and their Additional Protocols accepted outside supervision.

Whether such supervision has or has not been put into effect or whether it is itself sometimes hedged about by sovereignty reservation clauses which limit its scope is another question.

The pertinent fact is that these States, which could have limited themselves to a "material" commitment, have also accepted the possibility of supervision by a third party. In doing so, they have clearly "conceded" something to humanitarian law.

In this connection, we shall refer to the commitment the States have entered into to ensure respect for the Conventions and Protocols and to the system of Protecting Powers and substitutes they have set up.

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[60] Another branch in which it has generally proved necessary to provide for specific guarantee mechanisms, is that of human rights. This is hardly surprising, in view of the close relationship between the two disciplines.

(a) The commitment by States to "ensure respect" for the Geneva Conventions and Additional Protocol I

Article 1 common to the Conventions and Article 1, para. 1, of Protocol I contain the following rule: *"The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances".*

This is an unusual provision in international law which has given rise to different interpretations. As Sandoz notes:

"Some people feel that this obligation should be seen merely as clarification of the obligation to respect international humanitarian law and is consequently for domestic application. However, prevailing opinion favours a more comprehensive interpretation to the effect that the High Contracting Parties have an obligation to ensure that other States respect the Convention. The Commentary published under the general editorship of Jean Pictet states that this expression must be interpreted both as strengthening the obligation within the body of national law and as implying an obligation towards other States".[61]

The *Commentary on the Additional Protocols* confirms this interpretation.[62]

This clause must thus be understood as including a commitment by States to ensure respect by other States for the rules of international humanitarian law. But what is the content of this obligation and what does it amount to?

It is generally accepted that, with regard to the obligation to ensure respect for humanitarian law, the most that can be done by States is *"to take diplomatic measures or publicly denounce violations. It would be improper, and probably dangerous, to impose non-military sanctions (and still more obviously, to impose military sanctions or any form of intervention)".*[63]

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[61] *Op. cit.*, p. 266. The author adds that the 1968 International Conference on Human Rights held at Tehran had confirmed that interpretation. For an in-depth study of this obligation, reference may be made to Condorelli, Luigi and Boisson de Chazournes, Laurence, "A few comments on the obligation of States to 'respect and to ensure respect for' international humanitarian law 'in all circumstances'", *Etudes et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge, en l'honneur de Jean Pictet*, Geneva, The Hague, ICRC, Martinus Nijhoff Publishers, 1984, pp. 17-35.

[62] *Commentary on the Additional Protocols*, pp. 35-37, paras. 41-46.

[63] Sandoz, *op. cit.*, p. 266. See also *Commentary on the Additional Protocols*, pp. 36-37, paras. 43-46.

In practice, though this is not widely known because of the discretion that surrounds its work, it seems that the ICRC has based itself on this obligation when requesting States not party to a conflict to use their influence or offer their co-operation to ensure respect for humanitarian law.[64] Whatever the effectiveness of the system may be, the fact is that, by accepting that States not party to a conflict can have a responsibility with regard to the application of international humanitarian law, States have admitted a derogation to the principle of their sovereignty. States do not readily accept that other States are entitled to ensure respect, even to a limited extent, for their own obligations in their own territory.

(b) The system of supervision by Protecting Powers, their substitutes or the ICRC

The States party to the Geneva Conventions and their Additional Protocols have agreed also to submit themselves to supervision by the Protecting Powers, their substitutes or the ICRC.

As we have seen, the Protecting Power is a *"State instructed by another State (known as the Power of origin) to safeguard its interests and those of its nationals in relation to a third State (known as State of residence)".*[65] In other words, this Power will be responsible for checking whether the State of residence is actually complying with the rules of humanitarian law in relation to the Power of origin and its nationals.

Scholars who have studied the institution in depth point out that, in practice, the system of Protecting Powers has not worked well and has rarely been applied, the main reasons for this situation being as follows:

"— the fear that the designation of a Protecting Power will be seen as recognition of the other Party (where it is not recognized);

— unwillingness to admit that an armed conflict exists or that there are differences of opinion as to the character of a conflict;

— the maintenance of diplomatic relations between belligerents;

— the pace of events in some wars;

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[64] *Commentary on the Additional Protocols*, p. 36, para. 43.

[65] *Commentary* on the First Convention, quoted by Sandoz, *op. cit.*, p. 266. See Article 8-8-8-9 common to the Conventions and Article 5 of Protocol I.

— the difficulty of finding neutral States acceptable to both parties and able and willing to act in this capacity".[66]

As for the substitutes for the Protecting Powers, Article 10-10-10-11 common to the Conventions presents a series of substitution solutions, the main idea being that, in every case, there must be an institution to supervise the application of humanitarian law.[67] The system of successive substitutes for the Protecting Powers has not been used in practice any more than that of the Protecting Powers.[68]

The ICRC can, as we have just seen, play the part of a substitute for a Protecting Power but also act outside this system as an impartial humanitarian organization under Article 9-9-9-10 and Article 3 common to the Conventions.

In practice the ICRC plays a considerable role, without having to establish on exactly what grounds it offers its services.[69]

Whether it is a question of a Protecting Power, a substitute for that Power or the ICRC when it is not acting as a substitute, it is important to emphasize that the body supervising the application of humanitarian law is external to the State which is subjected to the latter.

As noted above[70], the rule of State consent could obstruct the operation of the system. This does not mean, however, that the acceptance of supervision cannot also be interpreted as a "concession" by the traditional principle of State sovereignty.

2. The ban on reprisals against protected persons and property

Reprisals may be defined as measures in themselves unlawful which are adopted by a State following unlawful acts committed to its detriment by another State with the aim of compelling the latter to respect the law.[71]

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[66] *Ibid.*, p. 271. According to Torrelli, *op. cit.*, p. 102: "The fault in this system lies in the need to obtain the consent of all the Parties to the conflict".

[67] See also Article 5, para. 1 of Additional Protocol I.

[68] Sandoz, *op. cit.*, p. 274.

[69] *Ibid.*

[70] See above, pp. 116-118.

[71] See the definition of the International Law Institute, Nguyen Quoc *et al.*, *op. cit.*, p. 827.

In positive general international law, only non-armed reprisals which form part of what the International Law Commission calls countermeasures are accepted, on certain conditions.[72]

By derogation from general international law, international humanitarian law prohibits even non-armed reprisals against protected persons and property.

Thus the Geneva Conventions contain a general prohibition of reprisals[73], while Additional Protocol I contains a series of sectoral prohibitions.[74] In all cases, the texts make it clear that these prohibitions are absolute.[75]

The prohibition of reprisals in international humanitarian law found subsequent confirmation in the Vienna Convention on the Law of Treaties which exempts from the application of the *exceptio non adimpleti contractus*: *"provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties"* (Article 60, para. 5).

A priori, it is not very evident what relationship there may be between the question of reprisals and the principle of State sovereignty. It is true that this relationship is indirect. In fact, this subject is more closely related to the principle of reciprocity in international law which is itself a corollary of the principle of the sovereign equality of States.

The fact that a State has the possibility of taking reprisals against another State (in other words, of giving it tit for tat) is thus, in the last analysis, a manifestation of its sovereign equality with that State, and of its own sovereignty as such.

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[72] To be lawful, countermeasures must respond to an internationally unlawful act, be directed against the State that committed the act, be adopted only in case of necessity after a summons which has remained fruitless, and not be contrary to the *jus cogens* (Nguyen Quoc *et al.*, *op. cit.*, p. 830).

[73] See Article 46, Article 47 and Article 33, para. 3, of the First, Second and Fourth Convention respectively.

[74] Articles 20; 51, para. 6; 52, para. 1; 53, para. (c); 54, para. 4; 55, para. 2 and 56, para. 4.

[75] *Commentary on the Additional Protocols*, p. 242, para. 812. Torrelli (*op. cit.*, pp. 91-92) refers, however, to the positions of certain States during the Diplomatic Conference on the Reaffirmation of Humanitarian Law, which leave a doubt regarding effective respect for this prohibition. Cameroon, for example, commented: "A State cannot reasonably be asked to fold its arms when faced with grave and repeated breaches of the Conventions and Protocols by its adversary".

Consequently, the fact that the States party to the Geneva Conventions have renounced even non-armed reprisals is thus certainly an unusual derogation from the principle of State sovereignty.

3. Impossibility of absolving another State from its liability

This rule appears in Article 51-52-131-148 common to the Geneva Conventions, as supplemented by Article 91 of Additional Protocol I.

For example, Article 51 of the First Convention reads as follows:

"No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article".

The breaches in question are the grave breaches of the Conventions and Protocol I, already discussed above.[76]

The rule that interests us here is not that of the impossibility for a State to absolve itself from liability, but rather that of the impossibility of its absolving other States from any liability they have incurred.

The *Commentary on the Additional Protocols* explains this rule as follows:

"The purpose of this provision is specifically to prevent the vanquished from being compelled in an armistice agreement or peace treaty to renounce all compensation due for breaches committed by persons in the service of the victor.

(...)

On the conclusion of a peace treaty, the Parties can in principle deal with the problems relating to war damage in general and those relating to the responsibility for starting the war, as they see fit. On the other hand, they are not free to forego the prosecution of war criminals, nor to deny compensation to which the victims of violations of the rules of the Conventions and the Protocol are entitled".[77]

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[76] See Article 50-51-130-147 common to the Geneva Conventions and Articles 11, para. 4 and 85, paras 3 and 4 of Protocol I.

[77] *Commentary on the Additional Protocols*, pp. 1054-1055, paras 3649 and 3651.

The result is that no State party which has incurred liability for grave breaches can escape answering for it. This rule may be regarded as utterly prohibiting a State to renounce its rights, whereas general international law normally sets no limits upon the right to renounce the subjective rights of States.

If we bear in mind that the right to renounce its rights is a sovereign attribute of the State, we realize that any erosion of this right, even when agreed to by the State in question, is another concession by the principle of State sovereignty to humanitarian law.

As regards the implementation of international humanitarian law, we should emphasize the dissuasive effect, at least in theory, of the rule barring one State from absolving another of its liability. Knowing that, whatever happens, it will be held responsible for all grave breaches imputable to it, every State should normally be more inclined to respect the material rules of humanitarian law.

CONCLUSION

In general, it would seem that the imperative necessity of implementing international humanitarian law should normally push back the principle of State sovereignty.

In actual fact, this principle has made a few "concessions" which take the form of rules derogating from general international law, such as the obligation to ensure respect for the Conventions and Protocols, the acceptance of outside machinery to supervise respect for these instruments, the absolute prohibition of reprisals, even non-armed ones, against protected persons and property, or the equally absolute impossibility for a State to absolve another from the liability it has incurred for grave breaches.

Nevertheless, if we look closely, international humanitarian law itself conceals a number of mechanisms defending State sovereignty, which more or less hamper its implementation. In the first place, we have the possibility granted to States to denounce the Conventions and the Protocols and the option of making reservations concerning them. Then there are rules which provide for the agreement or consent of the State, which reserve State security and military necessities, which leave the State a wide margin of judgement or which reserve to the State certain exclusive powers. It is evident, too, that the principle of sovereignty regains still more ground in the special situation of implementing international humanitarian law in non-international armed conflicts.

Lastly, it appears that despite the few "concessions" it has made to international humanitarian law, the principle of State sovereignty still places many obstacles in the way of its implementation. We have endeavoured to identify some of these obstacles, and the arduous task remains of convincing States that certain of them should be removed. But that is another question.

Gérard Niyungeko

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National Measures to Implement International Humanitarian Law

STEPS TAKEN BY THE ICRC

Like any body of law, international humanitarian law (IHL) was intended not as a series of abstract precepts, but as a set of specific rules governing real situations. This is reaffirmed in Article 1 common to the Four Geneva Conventions of 1949, which lays down the obligation for the High Contracting Parties to respect and ensure respect for these treaties in all circumstances.

The widespread acceptance of the 1949 Geneva Conventions, to which 166 States are party, and of their Additional Protocols I and II of 1977, to which 100 and 90 States, respectively, are party, shows the importance attached to them by the international community. The ICRC is nevertheless aware that these treaties cannot be fully respected unless the States adopt measures at the national level to guarantee that they are actually implemented. Such measures range from the incorporation of the treaty provisions into the national legislation, in accordance with the legal system of each State, to the adoption of the legislative, administrative or practical measures necessary for their full implementation.

Pursuant to its recognized responsibility in the field of IHL, as laid down in the treaties, in the Statutes of the International Red Cross and Red Crescent Movement and in its own Statutes, the ICRC has regularly reminded the States of the importance in general of adopting national measures to implement IHL, and has particularly emphasized the need to do so in certain fields.[1]

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[1] See reports entitled "Respect of the Geneva Conventions – Measures taken to repress violations" (Vols. 1 and 2) submitted by the ICRC to the 20th International Conference of the Red Cross (Vienna, 1965) and to the 21st International Conference of the Red Cross (Istanbul, 1969), respectively. On other occasions, the ICRC has also gathered information on the measures taken by the States to protect the Red Cross and Red Crescent emblem and name.

Since much remains to be done in this respect, the ICRC submitted a working paper to the 25th International Conference of the Red Cross (Geneva, October 1986) and proposed a draft resolution, which was combined with another draft resolution and adopted by consensus by the Conference as Resolution V entitled "National measures to implement international humanitarian law". The resolution essentially reminds the States party to the Geneva Conventions and their Additional Protocols of their obligation to adopt national measures to implement IHL and to keep one another informed in this respect through the depositary, invites National Societies to assist their own governments in fulfilling this obligation, appeals to governments and National Societies to inform the ICRC of the measures taken or under consideration and requests the ICRC to gather and assess the said information and to report regularly to future International Conferences.

As a follow-up to that resolution, on 28 April 1988 the ICRC wrote to the governments of the States party to the 1949 Geneva Conventions and to their National Societies asking for details of national measures. Very few replies were received and a year later it sent them a second circular, together with an *interim report* (see below) describing the outcome of its efforts to obtain information and summarizing the salient points and shortcomings of the replies received. This new appeal elicited replies from some of the States that had not yet answered and further details from others.

The ICRC attaches great importance to the adoption of national measures to implement IHL. It therefore does not intend to confine its efforts to written requests, but plans to use every available means to remind the States of their obligation and to assist them in fulfilling it.

In this spirit the ICRC organized, in co-operation with the Bulgarian Red Cross and the International Institute of Humanitarian Law, a first regional seminar on the subject. The seminar, which was held from 20 to 22 September 1990 in Sofia and was attended by representatives of the governments and the National Societies of 11 European countries, provided an initial opportunity for participants to share their experience. The report on the proceedings of the seminar appears in this issue of the *Review* (p. 223). In view of the success of this initial seminar, similar meetings will be organized in other regions, in conjunction with other initiatives at the national level.

The ICRC nevertheless considers it essential to obtain the opinions of the States party as to how it might best assist them in adopting national measures to implement IHL. On 18 January 1991, in the absence of any proposals to that effect from the States, it sent them

a reminder together with a document containing suggestions received from various other quarters.

The ICRC will submit to the forthcoming International Conference of the Red Cross and Red Crescent (Budapest, November 1991) a report summarizing and assessing all the replies received and presenting its conclusions on the subject.

* * *

INTERIM REPORT

On 28 April 1988, as a follow-up to Resolution V of the 25th International Conference of the Red Cross (Geneva, October 1986), entitled "National measures to implement international humanitarian law", the International Committee of the Red Cross contacted the States party to the 1949 Geneva Conventions and, where appropriate, to one or both of the 1977 Additional Protocols, as well as the National Red Cross and Red Crescent Societies, to obtain any information on legislative and practical measures they had taken or intended to take in peacetime to facilitate the effective implementation of international humanitarian law in time of armed conflict.

Resolution V, which reaffirms that the very applicability of the treaties of international humanitarian law depends largely on the adoption of appropriate national legislation:

— *urges the States party to fulfil their obligation to adopt or supplement the relevant national legislation, as well as to inform one another of the measures taken or under consideration for this purpose;*

— *invites the National Societies to assist and co-operate with their own governments in fulfilling their obligation in this respect;*

— *appeals to governments and National Societies to give the ICRC their full support and the information to enable it to follow up the progress achieved;*

— *requests the ICRC to gather and assess the said information and to report regularly to the International Conferences of the Red Cross and Red Crescent on the follow-up to the resolution.*

All the documents sent to the governments and National Societies were published in the March-April 1988 issue of the International

Review of the Red Cross *(No. 263) to ensure that they were as widely read as possible.*

The ICRC asked the States and the National Societies to inform it within a period of six months about the national measures they had taken or intended to take. Over one year later, the ICRC regrets to note that it has received very few answers.

In answer to the 160 letters sent to governments, the ICRC had received only 26 replies by 30 June 1989. Eleven of the replies came from States which are party to the 1949 Geneva Conventions only, namely: Brazil, Canada, Egypt, Germany (Dem. Rep.), Germany (Fed. Rep.), Haiti, Ireland, Israel, Nicaragua, Portugal and the United States. Twelve other* replies came from States which are party to both Protocols (Austria, Belgium, Burkina Faso, Denmark, the Holy See, Italy, Jordan, the Netherlands, New Zealand, Sweden, Switzerland and Uruguay). Two States party only to Additional Protocol I (Cuba and Mexico), and one State party only to Additional Protocol II (Philippines) also replied.*

Some of the States mentioned above simply acknowledged receipt of the ICRC's letter, others indicated that an interministerial committee had been set up to study the follow-up to be given to Resolution V. Only a few gave any substantial information.

The ICRC received replies from the following 15 National Red Cross and Red Crescent Societies: Australia, Austria, Canada, Czechoslovakia, Egypt, France, Germany (Dem. Rep.), Germany (Fed. Rep.), Hungary, Italy, Jordan, Libya, the Netherlands, the United Kingdom and the United States. All these replies were substantive; some were preliminary, others definitive.*

In analysing the replies, the ICRC observed that in a number of ways they did not correspond to the Memorandum and Indicative List it had sent with the letter on 28 April 1988:

— *some contained no information on the relationship between international law and the internal law of each State;*

— *some made no mention of exchanges of information, through the depositary, on national measures of implementation taken by the States party;*

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* (Editor's note) In addition, the Republic of Korea and the Botswana Red Cross Society answered the ICRC's letter of 28 April 1988 on 6 and 7 September 1988, respectively. Therefore the ICRC had in fact received, as at 30 June 1989, replies from 27 States, 13 of which were States party also to the Additional Protocols, and from 16 National Societies.

— *the measures were at times listed in an order which differed from that in the Memorandum and the Indicative List, making it difficult, and in some cases impossible, to analyse the replies;*

— *in some replies, the list of measures taken or intended concerned implementation of only the Geneva Conventions or only the Additional Protocols, even when the States concerned were party to all the treaties;*

— *often no reference was made to statutes, rules or decisions incorporating international humanitarian law into internal legislation;*

— *there were often no excerpts of statutes, rules or decrees in the country's official language, nor copies of translations into one of the working languages of the International Conference of the Red Cross and Red Crescent;*

— *some replies contained no opinions or suggestions on how the ICRC could be more useful to the States in implementing international humanitarian law, for example by setting up an* ad hoc *documentation centre;*

— *the replies were sometimes presented in a way which made it impossible, when the time came, to transmit or publish the contents thereof separately from the correspondence with the ICRC;*

— *there was often no indication as to the person in charge of the matter.*

As regards the National Red Cross and Red Crescent Societies, the ICRC wishes to specify the special role assigned to them by Resolution V: to participate in the representations made by the ICRC to government authorities in order to promote the adoption of legislative and practical measures in time of peace.

To do this, the National Societies could:

— *make one person responsible for the matter within each National Society;*

— *ask the government to set up an interministerial committee to study the matter, if such a committee does not already exist;*

— *appoint a representative to sit on the committee;*

— *make sure that the government informs the ICRC and the States party to the treaties on international humanitarian law if such a committee is set up and about any measures taken, under consideration or intended;*

— *assist the government in drafting its answers, perhaps by helping to translate relevant legislation into one of the languages of the International Conference of the Red Cross and Red Crescent.*

The purpose of this Interim Report is to provide information on the replies received to the ICRC's letter of 28 April 1988 on the implementation of international humanitarian law.

The mandate conferred on the ICRC by the States, in particular in Resolution V, demonstrates the importance the international community attaches to national measures to implement international humanitarian law, which should be adopted immediately following ratification of or accession to the treaties in question.

For the ICRC to be able to fulfil its obligation in this regard, the States must provide it with precise and comprehensive information – accompanied by copies of the relevant texts – on all legislative, administrative and practical measures taken or being drawn up, and if possible also on all those being considered.

Given its mandate to ensure the application of humanitarian law, the ICRC must stress the fact that it will not be able to submit a substantive report to the next International Conference of the Red Cross and Red Crescent – and above all will not be able to provide any useful services to States in the long term – unless the States entirely fulfil their obligations relative to the implementation of the Conventions and, as appropriate, the Additional Protocols.

Geneva, 15 August 1989

Implementing International Humanitarian Law: Problems and Priorities*

by Dieter Fleck

The implementation of international humanitarian law applicable in armed conflicts must be considered in the light of three basic problems.

First, in time of peace no one wants to think about the kind of situation where this body of law is put into practice. Nor is it easy to foster enthusiasm for legal rules which are beyond people's personal experience. But unless certain efforts are made and steps taken in peacetime, it cannot be expected that these rules will be implemented in time of crisis or war.

Actual documented practice is a second problem: the applicable rules have largely been violated during armed conflicts. The general consensus has it that such violations cannot be successfully sanctioned and that humanitarian protection therefore cannot stand the test of reality.

The third problem is related to the first and the second. Humanitarian law can be expected to evolve only after armed conflicts have ended, in times of lasting peace; many people therefore believe that progress can be made only when the need for measures of implementation seems most remote.

Given these problems and preconceived notions, it is heartening to see that increased interest has been aroused, not only by the frequent reports of grave breaches of humanitarian principles but also by the complex state of national decisions regarding the ratification of the

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* Article based on a lecture given at the Seminar on the Implementation of International Humanitarian Law, organised by the ICRC in cooperation with the International Institute of Humanitarian Law and the Bulgarian Red Cross, Sofia, 20-22 September 1990.

1977 Protocols additional to the Geneva Conventions[1] and the 1980 UN Weapons Convention,[2] in efforts made to implement the relevant parts of treaty-based and customary international law in this respect.

This article asks three practical questions: what is required under existing international law (I)? Which provisions of humanitarian law have already been implemented (II)? What national and international measures should now be taken (III)? The article ends with a general assessment (IV) including some suggestions on how to solve the main problems mentioned at the beginning.

I. What is required under existing humanitarian law?

The rules of international humanitarian law are to a great extent peremptory norms *(jus cogens)* which, in accordance with Article 53 of the Vienna Convention on the Law of Treaties, are "accepted and recognized by the international community of States as a whole" as norms "from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".[3] Most of the provisions of international humanitarian law are also *self-executing.* They are unequivocal and complete and hence can be implemented by government agents and individuals without national legislative measures.[4] There are, however, certain exeptions. Some of the provisions of international humanitarian law do require legislative measures for implementation; insofar as those measures have not yet been taken, they should be drawn up when ratification is decided on or as soon as possible thereafter. This is especially true for the obligation to prosecute grave breaches, but the implementation of *self-executing* provisions can and should be facilitated and supported by national laws, regulations and directives as well.

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[1] At present (February 1991) Protocol I (relating to the protection of victims of international armed conflicts) is in force for 100 States, Protocol II (relating to the protection of victims of non-international armed conflicts) for 90 States.

[2] Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be excessively injurious or to have indiscriminate effects, in force for 28 States.

[3] Lauri Hannikainen, *Peremptory Norms (jus cogens) in International Law. Historical Development, Criteria, Present Status,* Helsinki, Finnish Lawyers' Publishing Company, 1988.

[4] Krzysztof Drzewicki, "International Humanitarian Law and Domestic Legislation with Special Reference to Polish Law", *Revue de droit pénal militaire et de droit de la guerre,* Brussels, Vol. XXIV-1-2, 1985, pp. 29-52 (33).

Many provisions of humanitarian law expressly call for national measures of implementation. In doing so, they comply with Article 26 of the Vienna Convention, which provides that any treaty in force is "binding upon the parties to it and must be performed by them in good faith"; they also meet the specific requirements for humanitarian protection in wartime conditions, when respect for the rules cannot easily be expected unless express national and international action has been taken to direct and support implementation.

There exists a wealth of general and specific studies on this topic,[5] which is also the subject of a comprehensive programme of action drawn up by the International Committee of the Red Cross and the League of the Red Cross and Red Crescent Societies and adopted at the last International Conference of the Red Cross.[6] The

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[5] See International Committee of the Red Cross and Henry Dunant Institute (eds.), *Bibliography of International Humanitarian Law Applicable in Armed Conflicts*, second edition, Geneva 1987, Part V: "Implementation of International Humanitarian Law", pp. 423-507; "Implementation of the Protocols", *International Review of the Red Cross*, N° 217, July-August 1980, pp. 198-204; Michael Bothe and Karin Janssen, "The implementation of international humanitarian law at the national level – Issues in the protection of wounded and sick", *International Review of the Red Cross*, N° 253, July-August, pp. 189-199; *International Institute of Humanitarian Law*, 12th Round Table on Current Problems of International Humanitarian Law, Refugee Day, and Red Cross and Red Crescent Symposium, Summary of Reports and Discussions on Current Problems of International Humanitarian Law (San Remo, 2-5 September 1987) [Umesh Palwankar, *National Measures for the Implementation of International Humanitarian Law – An Outline of the Present Situation Illustrating Some of the Main Problems*, pp. 1-8; André Andries, *Prevention and Repression of Breaches of International Humanitarian Law – Preliminary Legislative and Other Measures for an Effective Application of International Humanitarian Law*, pp. 9-19; L. R. Penna, *Implementation of International Humanitarian Law and Rules of International Law on States Responsibility for Illicit Acts*, pp. 20-23]; Michel Veuthey, "Implementation and Enforcement of Humanitarian Law and Human Rights Law in Non-International Armed Conflicts: The Role of the International Committee of the Red Cross", *The American University Law Review*, Washington D.C., Vol. 33 (Fall 1983), N° 1; Michel Veuthey, "The Humanitarian Network: Implementing Humanitarian Law through International Cooperation", *Bulletin of Peace Proposals*, Oslo, Vol. 18, 1987, N° 2 pp. 133-146; Hubert Bucher, "Die Umsetzung der Zusatzprotokolle zu den Genfer Abkommen ins Bundesrecht", in Yvo Hangartner and Stefan Trechsel (eds.), *Völkerrecht im Dienste des Menschen, Festschrift für Hans Haug*, Bern and Stuttgart, 1986, pp. 31-45; Frits Kalshoven/Yves Sandoz (eds), *The Application of Humanitarian Law*, Dordrecht, Martinus Nijhoff Publishers, 1987; Frits Kalshoven/Yves Sandoz (eds.), *Implementation of International Humanitarian Law*, Dordrecht, Martinus Nijhoff Publishers, 1989; Françoise J. Hampson, "Fighting by the rules: Instructing the armed forces in humanitarian law", *International Review of the Red Cross*, 1989, N° 269, March-April 1989, pp. 111-124; *id.*, "Winning by the rules: law and warfare in the 1980s", *Third World Quarterly*, London, Vol. 11, N° 2, April 1989, pp. 31-62.

[6] *Third Programme of Action of the International Red Cross and Red Crescent Movement with respect to dissemination of international humanitarian law and of the principles and ideals of the Movement (1986-1990)*, adopted at the 25th International Conference of the Red Cross (Geneva, 1986) in Resolution IV.

programme and continuing activities in this field require the active support of nations and of individuals, who play a role of growing importance in encouraging respect for this part of international law, intended to protect the individual against States as well. The Red Cross Movement should be encouraged to cast a critical eye on the results of these endeavours. Governments and National Red Cross and Red Crescent Societies will have the opportunity to do so at the forthcoming 26th International Conference of the Red Cross and Red Crescent.[7]

Each country has different needs and priorities for the implementation of international law. The same holds true, of course, for experts working in this field at international level. When it comes to humanitarian law, one traditional school of thought considers penal sanctions, legal provisions against the misuse of the protective emblems and administrative regulations to be important.[8] I consider organizational and educational measures and dissemination to be more important.

A comprehensive survey of required measures should include the following:

1. National legislation

- Laws and regulations should provide for the application of the Geneva Conventions (I, 48; II, 49; III, 128; IV, 145) and Additional Protocol I (AP I, 84).[9]

- National legislation must be enacted to provide for appropriate penal sanctions of grave breaches of international humanitarian law (I, 49-50; II, 50-51; III, 129-130; IV, 146-147; AP I, 85-91).

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[7] See: "National Measures to Implement International Humanitarian Law – A new move by the ICRC", *International Review of the Red Cross*, N° 263, March-April 1988, pp. 121-140; María Teresa Dutli, "National measures for implementation of international humanitarian law", *Dissemination*, N° 13, May 1990, pp. 8-10.

[8] This point of view has been criticized by G.I.A.D. Draper in "The Implementation and Enforcement of the Geneva Conventions of 1949 and of the Two Additional Protocols of 1977", *Recueil des cours de l'Académie de droit international de la Haye*, 1979, III, pp. 5-54.

[9] The Roman numerals stand for one of the four 1949 Geneva Conventions, AP I (or II) for Additional Protocol I (or II) of 1977; the Arabic numerals refer to the relevant article.

- Legislative measures are required to prevent and suppress, at all times, misuse of the protective emblems (I 53-54; II 43-45).

2. Organizational measures in peacetime

- National Red Cross and Red Crescent Societies and other voluntary aid societies must be duly recognized and authorized by their government (I, 26).
- Medical establishments and units shall, as far as possible, be situated in such a manner that attacks against military objectives cannot imperil their safety (I, 19).
- Medical establishments, units, transports and personnel shall be marked by the distinctive emblem of the red cross or red crescent (I, 38-44; II, 41-45; IV, 18).
- Optional light, radio and electronic signals should be provided to mark medical establishments, units and transports more effectively (AP I, Annex I, Articles 5-8).
- In the study, development, acquisition or adoption of a new weapon, means or method of warfare, it must be determined whether its use would, in some or all circumstances, be prohibited by international law (AP I, 36).
- To the maximum extent feasible, military objectives shall not be located within or near densely populated areas (AP I, 58).
- A civil defence organization should be set up for exclusively humanitarian tasks: to protect the civilian population against the dangers and to help it to recover from the immediate effects of hostilities or disasters, and to provide the conditions necessary for its survival (IV, 63; AP I, 61-67).
- National information bureaux for prisoners of war and civilians (III, 122-124; IV, 136-141), and tracing services for missing persons and children (AP I, 33, 78) shall be organized.
- Preparation shall be made for the notification of hospital ships (II, 22).
- Steps shall be taken to safeguard cultural property (1954 Hague Convention, 3).
- Legal advisers for military leaders shall be employed and trained (AP I, 82).

3. Organizational measures to be taken in the event of armed conflict

- Special agreements should be considered for all matters concerning which it may be deemed suitable to make separate provision (I, 6; II, 6; III, 6; IV, 7).
- Protecting Powers or substitutes should be appointed (I, 8, 10; II, 8, 10; III, 8, 10; IV, 9, 11; AP I, 5).
- The activities of the International Committee of the Red Cross must be facilitated and supported (I, 9; II, 9; III, 9; IV, 10; AP I, 81).
- The possibilities and procedures for international fact-finding should be encouraged and supported (I, 52; II, 53; III, 132; IV, 149; AP I, 90).
- The use of good offices for the settlement of disputes should be accepted and supported (I, 11; II, 11; III, 11; IV, 12).
- Hospital zones and localities shall be established for the wounded and sick (I, 23 and Annex I).
- Hospital and safety zones and localities shall be established for the civilian population (IV, 14 and Annex I).
- Prisoners of war shall be protected, and procedures shall be enacted for a competent tribunal to determine the status of persons who have fallen into enemy hands (III, 5 para. 2; AP I, 45 para. 2).

4. Dissemination and educational measures

- Dissemination activities shall be developed at various levels for the military forces and the civilian population (I, 47; II, 48; III, 127; IV, 144; AP I, 83; AP II, 19).
- Qualified personnel shall be trained to facilitate the implementation of the Geneva Conventions and the Additional Protocols (AP I, 6), the 1954 Hague Convention on the protection of cultural property and the Regulations for its execution (1954 Hague Convention, 25-27).
- The armed forces shall receive instruction in international humanitarian law (AP I, 82).

II. What has been achieved in practice?

The International Society for Military Law and the Law of War devoted its XIth Congress (Edinburgh, 19-23 September 1988) to the implementation of international humanitarian law at the national level. A General Report, based on written reports from 18 countries on four continents, and a wide-ranging discussion[10] provide a broad spectrum of opinions and legal answers to questions about national implementation.

The International Institute of Humanitarian Law has performed an outstanding task over the last twenty years by disseminating knowledge of the law in international courses, encouraging national activities to further this end, and maintaining a continuing humanitarian dialogue. Extensive documentation and evaluation of national activities worldwide can be expected from a research project directed by Professor Michael Bothe.[11]

Taking my own country, Germany, as an example, an important task was certainly to finalize the ratification of the Additional Protocols. The Ratification Act was signed on 11 December 1990[12] and the ratification document was deposited with the Swiss Federal Council on 14 February 1991.[13] The German declarations of understanding made on this occasion meet international standards and clearly state that even members of an alliance who have different positions on ratification of the Additional Protocols can still solve problems of applicability in this respect. In accordance with Article 90, para. 2 of Additional Protocol I Germany also recognized *ipso facto* the competence of the International Fact-Finding Commission. The establishment of this new body to ensure respect for the Conventions and the Protocols should be broadly supported so as to ensure equitable geographical representation as required under Article 90 para. 1 d).

International treaty law is part of internal German law by virtue of the ratification of the relevant treaties (Art. 59, para. 2 of the Basic Law of the Federal Republic of Germany). Moreover, the general rules

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[10] Published in: *Revue de droit militaire et de droit de la guerre*, Brussels, Vol. XXVIII-1-2, 1989, pp. 11-379.

[11] Michael Bothe (ed.), *National Implementation of International Humanitarian Law, Proceedings of an International Colloquium held at Bad Homburg, June 16-19, 1988*, Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1990.

[12] 11 December 1990 Law related to the Additional Protocols of 1977 to the Geneva Conventions of 1949 (Bundesgesetzblatt 1990 II 1550).

[13] See the present issue of *International Review of the Red Cross*, pp. 234-236.

of international law are directly applicable internally and take precedence over all other legislation (Art. 25 of the Basic Law). Consequently, the provisions of the four Geneva Conventions and their Additional Protocols, insofar as they are considered to be general rules of international law within the meaning of this constitutional provision (i.e. insofar as they are part of universally applicable customary international law), are in practice part of our constitution. This is in fact the case for a considerable part of treaty-based and customary humanitarian law, but not for each single provision.

In keeping with this general approach, grave breaches of international humanitarian law are sanctioned in Germany by the provisions of the general Criminal Law *(Strafgesetzbuch).* The unauthorized use of the red cross and red crescent emblems and other associated signs is prohibited and punishable under the Administrative Offenses Act *(Ordnungswidrigkeitengesetz).* The protection of medical personnel, units and transports is governed by directives and service regulations, which also define protected personnel and contain provisions on marking and identification, on the extent of permissible use of medical vehicles and medical aircraft, and on disguising the distinctive emblem in exceptional cases. Preparations for National Information Bureaux for protected persons (III, 122-125; IV, 138-141; AP I, 78) are made both by the Federal Ministry of Defence and the German Red Cross. No provisions have been made for the establishment of zones of special protection (IV, 14) but the establishment of hospital zones (I, 23), for which the selection of suitable locations can be a problem, is being studied. The Geneva Conventions set forth strict requirements for the establishment of such zones. It is difficult to meet all requirements in densely populated areas and detailed planning in peacetime appears to be impossible.

The German Red Cross plays an active role in disseminating humanitarian law, motivating volunteers from a broad cross-section of the civilian population to deal with this complex set of rules. The German Red Cross has published, in addition to a four-language edition of the Fourth Geneva Convention and the Additional Protocols,[14] a number of manuals on certain aspects of particular interest.[15]

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[14] *Das IV. Genfer Abkommen vom 12. August 1949 zum Schutze von Zivilpersonen in Kriegszeiten, Textband* (Vol. 1), Eds. Wolfgang Voit and Elmar Rauch, Bonn 1980, 293 pages (texts in German, French, English, and Russian); *Zusatzprotokolle zu den Genfer Abkommen vom 12. August 1949 über den Schutz der Opfer bewaffneter Konflikte, Textband* (Vol. 2), Eds. Wolfgang Voit and Elmar Rauch, Bonn 1981, 452 pages (texts in German, French, English, and Russian).

[15] *Der Schutz der Zivilkrankenhäuser und ihres Personals,* Ed. Hans Giani,

A Presidential Commission of the German Red Cross acts as the main forum for all questions related to the implementation of humanitarian law in Germany, thus making available advice by highly qualified independent experts and at the same time promoting ongoing dialogue with representatives from the Ministries of External Affairs, the Interior, and Defence. The Federal Armed Forces and the German Red Cross co-operate closely in various activities to disseminate and implement humanitarian law.

The Federal Armed Forces, for their part, have legal advisors down to division level. Their task is not only to provide legal counsel as required under Article 82 of Additional Protocol I, but also to act as attorneys in disciplinary matters. Germany does not have a special criminal jurisdiction for the armed forces but there are military disciplinary courts. The Defence Ministry's legal service deals with all relevant international legal affairs, including the legal assessment of new weapons, means or methods of warfare (AP I, 36).

Dissemination and educational measures are actively supported by the universities, the German Society for Military Law and Humanitarian Law and two specialized academic journals,[16] which are used in addition to international journals available.

III. What remains to be done?

A comparison of what is required and what has been done reveals that although valuable work has been accomplished in numerous countries, many agreed measures of implementation remain to be taken. This is a serious problem and undoubtedly one of the main reasons why humanitarian law is disregarded in armed conflicts.

Measures of implementation have to be assessed from the long-term point of view. Given the complexity of peacetime and wartime tasks, the question of what should be done to ensure the proper imple-

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Heft 3, Bonn 1980, 79 pages; *Zivilschutz*, Ed. Georg Bock, Heft 4, Bonn 1981, 98 pages; *Der Schutz im Bereich der öffentlichen Verwaltung*, Ed. Walter Hofmann, Heft 5, Bonn 1982, 79 pages; *Polizei (Vollzugspolizei der Länder, Bundesgrenzschutz)*, Eds. Ernst Rasch and H. Joppich, Heft 6, Bonn 1983, 74 pages; *Heft für Juristen*, Eds. Wolfgang Voit and Michael Bothe, Heft 7, Bonn 1984, 136 pages; *Es begann in Solferino*, Eine Darstellung der Genfer Rotkreuz-Abkommen, German Red Cross, 40 pages; *Es begann in Solferino*, Die Genfer Rotkreuz-Abkommen, Problemfälle – Beispiele – Sachverhalte, Lösung der beschriebenen Fälle, Handbuch für Lehrkräfte, Juristen and Konventionsbeauftragte, Horst Seibt, German Red Cross, 64 pages.

[16] *Neue Zeitschrift für Wehrrecht; Humanitäres Völkerrecht – Informationsschriften.*

mentation of humanitarian law is not easy to answer. We cannot meet all requirements at once and therefore have to set priorities.

To take the example of my own country again, particular efforts are presently being made to draft new German military manuals on humanitarian law.[17] A collection of all relevant international instruments, with annotations and an index, is also being prepared. Moreover, we are about to draft a handbook on humanitarian law which will in fact be the first complete and concise modern reader on the subject to be published in German. It is necessary to publish military manuals on humanitarian law and to distribute them far beyond military circles, for the handbook cannot be prepared without outside help from universities and Red Cross experts. An English translation of the draft is being sent to our allies and all friends willing to assist us in this task. The results of all these discussions will be incorporated into the final text. Finally, a précis of the handbook and a collection of cases and solutions will be part of our manuals programme.

A number of different measures of implementation which should be taken up relate to the *identification* of works and installations containing dangerous forces (AP I, 56), and the identification of cultural property. Here Germany will have to harmonize differences in implementation which derive from its federal system. We also have to take decisions on the *status of civilian personnel* employed for military tasks, and to prepare the necessary *notifications* on the status of personnel, the recognition of aid societies and humanitarian organizations (I, 26), and on hospital ships (II, 22). A practical problem is posed by the protection of *search and rescue helicopters*, since they are also designed for reconnaissance and not just for humanitarian missions. This is a problem faced by most armed forces in the world. *Ad hoc* protection for search and rescue missions in times of armed conflict is an important issue, one worth taking up at international level. This also holds true for various other measures which can hardly be promoted except in international co-operation. The training of *legal advisers* in the armed forces is already to an important degree based on international exchange activities, of which the courses organized by the International Institute of Humanitarian Law are of particular value. Our courses in Germany are open to foreign participants both as

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[17] *Zentrale Dienstvorschrift 15 – ZDv 15* [Joint Services Manual 15] *Humanitäres Völkerrecht in bewaffneten Konflikten* [International Humanitarian Law in Armed Conflicts] (under preparation); *15/1 – Grundsätze* [Principles]; *15/2 – Handbuch* [Handbook]; *15/3 – Textsammlung* [Collection of Instruments]; *15/4 – Sammlung von Fällen mit Lösungen* [Collection of Cases and Solutions].

students and lecturers. Thus we can benefit from international support even at home.

Other measures to be considered and planned in peacetime concern *medical zones* (I, 23 and Annex) and *security zones* (IV, 14 and Annex), the *protection of cultural property*, in particular refuges intended for sheltering movable cultural property (1954 Hague Convention 8), and the organization of a *National Information Bureau* in co-operation with the National Red Cross Society (III, 122, IV, 136). The 25th International Conference of the Red Cross (Resolution XIV) urged the States party to the Conventions to consider taking such measures as may be necessary to institute their National Information Bureau in peacetime so that they would be in a position to fulfill tasks as soon as possible in the event of an armed conflict. German planning efforts in this respect are still in the early stages, and we could benefit from the expertise of the International Committee of the Red Cross to make full use of modern information technology which could help not only to save manpower and financial resources but also to standardize information and thus make the Bureau more effective. A small mobile system and a few trained experts to handle it could render extremely valuable services in armed conflicts. This idea might sound too practical, but the question should nevertheless be asked whether industrialized countries could not offer assistance in this field, in the interests of humanitarian protection, to the parties to ongoing conflicts or to victims of disaster situations.

Lastly, various *legal issues* should be settled in co-operation with the relevant ministries, agencies, allied forces, alliances, etc. (e.g. rules of engagement - AP I, 87).

While it remains true that implementation of international obligations is a national responsibility, efforts taken by or under the auspices of international organizations may enjoy a higher degree of publicity, at least among the relevant agencies and experts. Problems may arise, however, in terms of effectiveness and lack of national support. In the absence of a functioning system of Protective Powers and/or substitutes, the International Fact-Finding Commission (AP I, 90), the formal establishment of which is now possible, could act as a deterrent against violations of humanitarian law. I consider it a task of top priority in this respect to make strong efforts to enlarge participation in and support for this new system and to develop ideas as to how it could make inquiries and use its good offices, as provided in Article 90, paras. 2 c) and d). It would be helpful if the Commission could establish and publish its own rules as soon as possible, even if

these rules are not very likely to be put to the test in the foreseeable future.[18]

The International Committee of the Red Cross, whose mandate to gather and assess all information on legislative and other measures taken for the implementation of humanitarian law and to report regularly on the follow-up was expressly renewed by the 25th International Conference of the Red Cross (Resolution V), can be expected to offer not only a general review of current achievements and problems in the implementation field but also prospects and suggestions for future work to be taken up by the Red Cross Movement. The States party to the Geneva Conventions should meet the challenge and give full support to necessary activities.

The problem of ensuring "respect for human rights in armed conflicts" can also be tackled through United Nations bodies, which have in fact been dealing with the matter now for many years and which should stress this as one of the main activities to be undertaken during the United Nations Decade of International Law (1990-99).[19]

Finally, nations might be encouraged to report to the Swiss Federal Council, as the depositary of the Geneva Conventions and their Additional Protocols, on national rules and regulations and other measures adopted to implement humanitarian law. The Geneva Conventions and their Additional Protocols (I, 48; II, 49; III, 128; IV, 145; AP I, 84) provide that the High Contracting Parties shall communicate to one another, through the Swiss Federal Council and, as appropriate, through the Protecting Powers, not only their official translations of the Conventions and Protocols but also the laws and regulations which they may adopt to ensure the application thereof. Similar information on the 1954 Hague Convention on the Protection of Cultural Property could be sent to UNESCO.

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[18] J. Ashley Roach, *Fact-Finding Commission Under Article 90: Criteria for Implementation*, paper presented to the 15th Round Table on Current Problems of International Humanitarian Law (San Remo, 4-8 September 1990). See also his article in the present issue of the *IRRC*, pp. 167-189, "The International Fact-Finding Commission – Article 90 of Protocol I additional to the Geneva Conventions".

[19] The UN Commission on Human Rights, in its resolution 1990/66 (7 March 1990), entitled *Human rights in times of armed conflicts*, calls upon all governments to give particular attention to the education of all members of security and other armed forces, and of all law enforcement agencies, in the international law of human rights and international humanitarian law applicable in armed conflicts. Information on the scope of education provided to members of the police and the armed forces is requested by all governments, and an analytical review of the replies received shall be submitted to the Sub-Commission at its forty-second session.

The activities of all the above require a considerable degree of planning and co-ordination if they are to be really useful. To make such co-ordination possible, the States should be encouraged to assist the International Committee of the Red Cross by giving advice, offering information and reporting on relevant activities upon request.

Since successful implementation of humanitarian law depends to a great extent on international co-operation, the forthcoming 26th International Conference of the Red Cross and Red Crescent should be used as a forum for the exchange of information and opinions and for the assessment of current problems and of proposals for further development of implementation work.[20]

IV. Conclusions

Frequent violations of humanitarian rules and a widespread ignorance of their content, problems and limits have caused considerable difficulties for acceptance of this part of international law. At the same time, the great complexity and the technical nature of various measures may hinder proper implementation. Such problems of motivation and acceptance can only be solved through joint efforts and continued international co-operation.

Convincing solutions are not to be found in the isolated efforts of specialists. Appropriate attitudes towards the protection of the victims of armed conflicts require a generalized approach which takes into account other humanitarian problems, such as population growth, environmental hazards, internal disturbances, hunger, refugee movements, terrorism, drug abuse and exploitation by multinational companies.[21] For the men, women or children who suffer it does not matter very much whether their suffering is caused by war, terrorism, political oppression or natural disaster. On the other hand, the diversity and the extent of existing challenges have led to a greater awareness for specific tasks at hand.

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[20] Bosko Jakovljevic, *Ensuring Observance of International Humanitarian Law: The International Conference of the Red Cross and Red Crescent and the Implementation of International Humanitarian Law*, paper presented to the 15th Round Table on Current Problems of International Humanitarian Law (San Remo, 4-8 September 1990).

[21] Cf. *Winning the Human Race. The Report of the Independent Commission on International Humanitarian Issues*, Foreword by Sadruddin Aga Khan and Hassan bin Talal, London and New Jersey, 1988.

In all of these situations various organisational problems call for concentration and integrated solutions. It is a well-known fact, for example, that even large organisations do not have enough time to train their staff. We cannot expect more than a limited number of lessons on humanitarian law to be given in military courses. But the participation of a legal adviser in the review of operational plans may well result in a higher degree of awareness of legal provisions in an even shorter time.

Plans of action and lists of priorities for the implementation of humanitarian law cannot be worked out unilaterally but only through joint international efforts. Such co-operation will lead to a better understanding of the practical impact of this field of law even in peacetime. In this regard I should like to stress the practical importance of humanitarian co-operation for bilateral relations, in view also of the importance of human rights as part of the common cultural heritage of mankind. Serious efforts to implement international humanitarian law may have confidence-building effects.

Dieter Fleck

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The Belgian Interdepartmental Commission for Humanitarian Law

by Marc Offermans

The Belgian Interdepartmental Commission for Humanitarian Law (ICHL) was established by a decision of the Council of Ministers on 20 February 1987. Its main task consists in studying national measures to implement the Protocols additional to the Geneva Conventions, and, if need be, the Conventions themselves.

After more than three years of ICHL activities, it seems appropriate to publish a paper on this Commission, which owes its existence largely to a Belgian Red Cross initiative.

After some general reflections on the implementation of international humanitarian law, this article describes the origins, the establishment, the composition, the tasks, the working methods and the working procedure of the ICHL.

It concludes with a brief survey of the Commission's activities from the date of its establishment up to the end of 1990.

Implementation of international humanitarian law

Ratification of or accession to the four Geneva Conventions of 12 August 1949 and of their two Additional Protocols, adopted on 8 June 1977, implies for the States party a commitment to respect and to ensure respect for these international instruments in all circumstances.

In order to ensure the faithful application of humanitarian law in the event of armed conflict, the States must, already in peacetime, take a number of internal measures. These measures may be of a legislative, statutory, administrative or practical nature. [1]

[1] On the implementation of international humanitarian law in Belgium, see

On several occasions the International Committee of the Red Cross (ICRC) has reminded the States of the importance of implementing international humanitarian law. It has drawn up an indicative list of national measures, to be taken in peacetime, to implement the Geneva Conventions and their Additional Protocols.[2] Among the Resolutions of the XXVth International Conference of the Red Cross was Resolution V, entitled "National measures to implement international humanitarian law".[3]

Origins of the ICHL

The Protocols additional to the Geneva Conventions of 12 August 1949, adopted in Geneva on 8 June 1977, were approved by Belgium in an Act of 16 April 1986[4] and entered into force on 20 November 1986, the instruments of ratification having been deposited with the Swiss Federal Council in Bern on 20 May of the same year.

A. Andries, "The implementation of the Additional Protocols in Belgium", *International Review of the Red Cross (IRRC)*, No. 258, May-June 1987, pp. 272-276. See also the Belgian report drafted in answer to the questionnaire on the "Implementation of international humanitarian law at the national level, with special reference to developments of modern warfare", at the XIth International Congress of the International Society for Military Law and the Law of War, held in Edinburgh, from 19 to 23 September 1988; this report was published in *The Military Law and Law of War Review*, 1989, pp. 91-121, and in the *Recueils de la Société internationale de droit militaire et de droit de la guerre*, XI (1), Brussels, 1989, pp. 91-121. See also the unpublished report by L. De Wever, "Preliminary report by the Belgian Red Cross on the role of a National Society in the adoption of legislative and administrative procedures for the implementation of the Geneva Conventions and their Additional Protocols in time of peace"; this report was presented in Geneva on 22 October 1989 during a day of study on international humanitarian law.

[2] This list, which is preceded by an introduction, is published in the *IRRC*, No. 263, March-April 1988, pp. 130-139, under the title "Respect for international humanitarian law. National measures to implement the Geneva Conventions and their Additional Protocols in peacetime".

[3] This Resolution, adopted in Geneva on 31 October 1986, is published in the *IRRC*, No. 255, November-December 1986, pp. 346-347 and No. 263, March-April 1988, p. 127.

[4] The Act of 16 April 1986 approving the following international treaties: the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) and the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II), adopted in Geneva on 8 June 1977 (*Moniteur belge* of 7 November 1986 and of 22 November 1986). The latter contains the Belgian interpretative declarations relating to Protocol I. The four Geneva Conventions had been approved long before, by Act of 3 September 1952 (*Moniteur belge* of 26 September 1952). The texts of the Geneva Conventions and the Additional Protocols are published in the *Moniteur belge*, in French and in Dutch.

Shortly afterwards, on 27 and 28 November 1986, the Belgian Red Cross organized a Symposium on the implementation of these new rules of international humanitarian law.[5] The proceedings of the Symposium have since been published.[6]

The three specialized commissions set up during this Symposium each examined one of the following themes: the repression of grave breaches of the Geneva Conventions and their Additional Protocols, the appointment of legal advisers in the Armed Forces and the dissemination of international humanitarian law.

In the addresses given during the Symposium, especially the speeches by the then President of the ICRC, Mr. A. Hay,[7] and the Belgian Prime Minister, Mr. W. Martens,[8] it was stressed on the one hand that the implementation of international humanitarian law is an essential corollary to ratification of the texts and, on the other hand, that implementation might not be properly assured unless there is co-ordination within a permanent body. This may be an existing body or one to be set up, bringing together in a manner yet to be determined the Government departments and the non-governmental bodies concerned, especially the National Red Cross Society.

Establishment of the ICHL

One of the major results of the November 1986 Symposium was the fact that on 12 February 1987 the Prime Minister addressed a note to the Council of Ministers in the following terms:

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[5] Reports on this Symposium may be found in the following works: A. Andries, "Le symposium de la Croix-Rouge sur les récents développements du droit humanitaire", *Journal des tribunaux,* 1986, p. 733; A. Andries, "The implementation...", *op. cit.,* note 1 above, pp. 275-276; C. Vandekerckhove, "Dissemination of international humanitarian law. The Belgian situation", *IRRC,* No. 258, May-June 1987, p. 278; G. Hullebroeck, "The dissemination of humanitarian law. One of our major concerns", *IRRC,* No. 263, March-April 1988, p. 178; L. De Wever, "Rodekruissymposium over tenuitvoerlegging van de Aanvullende Protokollen bij de Conventies van Genève", *Universeel. Tweemaandelijks tijdschrift van het Belgische Rode Kruis in Vlaanderen,* 1987, No. 1, pp. 12-14 and No. 2, pp. 90-92.

[6] These proceedings are published in *The Military Law and Law of War Review,* 1988, pp. 195-366. A report on this publication appears in A. Andries and F. Gorlé, "Chronique annuelle de droit pénal militaire (1988-1989)", *Revue de droit pénal et de criminologie,* 1989, pp. 964-965 and F. Gorlé and A. Andries, "Kroniek van militair strafrecht (1988-1989)", *Rechtskundig Weekblad,* 1989-1990, p. 658.

[7] The ICRC President's speech is published in *The Military Law... Review, op. cit.,* note 6 above, pp. 205-209.

[8] The Prime Minister's speech is published in the same *Review,* pp. 219-224.

"As our country has now ratified these important humanitarian treaties,[9] *we should promptly consider which implementation measures should be taken. It seems advisable to set up an interdepartmental commission which would be entrusted with drawing up an inventory of the measures to be taken, and with following up and co-ordinating the texts required by the competent Ministries. This commission could be chaired by the President of the Commission for National Defence Problems (CPND) and could also comprise representatives of the Prime Minister, the Ministers of Justice, the Budget, External Relations,*[10] *the Interior, Social Affairs and National Defence, and of the Secretary of State for Public Health".*

At its meeting of 20 February 1987, the Council of Ministers approved the proposal put forward in the note of 12 February 1987. Thus the ICHL was created.[11].

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[9] That is, the Protocols additional to the Geneva Conventions.

[10] Currently Foreign Affairs.

[11] The ICHL is mentioned in the following publications: A. Andries, "The implementation...", *op. cit.*, note 1 above, p. 281; A. Andries, "The international challenges facing humanitarian law today, 125 years after its creation", *IRRC,* No. 273, November-December 1989, pp. 561-562; C. Vandekerckhove, "Dissemination of international humanitarian law...", *op. cit.*, note 5 above, p. 281; M. Offermans, "La Commission interdépartementale de droit humanitaire (CIDH)", *More. Bulletin d'information pour le personnel de l'Administration générale civile du ministère de la défense nationale,* 1990, No. 1, pp. 21-25; A. Andries and F. Gorlé, "Chronique annuelle de droit pénal militaire (1986-1987)", *Revue de droit pénal et de criminologie,* 1987, p. 938; F. Gorlé and A. Andries, "Kroniek van militair strafrecht (1986-1987)", *Rechtskundig Weekblad,* 1987-1988, p. 481; R. Bats, Introduction to the report on the proceedings of the Symposium of 27 and 28 November 1986 devoted to the implementation of the Protocols additional to the Geneva Conventions of 12 August 1949, *The Military Law and Law of War Review,* 1988, pp. 197-199; L. De Wever, "Een verjaardag in het teken van een humanitair gebaar. 8 mei 1989. De Belgische Regering en de Gemeenschappen engageren zich voor het humanitair recht", *Universeel, Tweemaandelijks tijdschrift van het Belgische Rode Kruis in Vlaanderen,* 1989, No. 4, p. 166; L. De Wever, *Het Rode Kruis en de verspreiding van het internationaal humanitair recht,* 8-page brochure published by the Belgian Red Cross, Flemish Community, December 1989, p. 7; R. Remacle, "Conseillers en droit humanitaire", *Contact (Institut royal supérieur de défense),* 1988, p. 107; R. Bats, paper presented at the XIth International Congress of the International Society for Military Law and the Law of War, Edinburgh, 19-23 September 1988, devoted to the implementation of international humanitarian law at the national level, *The Military Law and Law of War Review,* 1989, pp. 363-365 and *Recueils de la Société internationale de droit militaire et de droit de la guerre,* XI (1), Brussels, 1989, pp. 363-365; Belgian report drafted in answer to the questionnaire on the implementation of international humanitarian law, during the same Congress, *idem,* p. 94. Moreover, a brief review of the first two years of the ICHL is given in the unpublished speech by the former ICHL president, R. Bats, under the title "La mise en œuvre du droit humanitaire en Belgique", at the Forum on international humanitarian law organized by the Belgian Red Cross on 8 May 1989 (see note 19 below).

Composition of the ICHL

Representatives of the Ministers and the Secretary of State

In accordance with the decision of the Council of Ministers which set up the ICHL, the latter consists of representatives of the Prime Minister, the Ministers of Justice, the Budget, External Relations,[12] the Interior, Social Affairs and National Defence, and of the Secretary of State for Public Health. These representatives, together with their deputies, may be members of the Ministers' or Secretary of State's staff or civil servants — or even officers, in the case of National Defence — of the Ministry concerned.

Representatives of the Red Cross

Representatives of both Communities of the Belgian Red Cross who are specialized in international humanitarian law are also actively involved in the ICHL activities. In fact, at its first meeting on 12 May 1987, the ICHL urged the Belgian Red Cross to participate in the Commission's activities.

Experts

The Commission also includes several experts appointed by some of the Ministers represented on the ICHL. This applies to the Ministry of Justice and the Ministry of National Defence. The majority of these experts are military magistrates specializing in international humanitarian law.

Chairman

Pursuant to the decision of the Council of Ministers which set up the ICHL, the latter is chaired by the President of the Commission for National Defence Problems (CPND).

The chair was first held by Major General (currently Lieutenant General) A. Everaert, until July 1987, and then by Major General R. Bats, from September 1987 until the end of September 1989. It is currently chaired by Major General G. Van Lancker.

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[12] Currently Foreign Affairs.

Secretary

In accordance with the ICHL's internal regulations, the Commission's Secretary is appointed by the Commission itself, on the proposal of its Chairman. At the moment the Secretary is the legal adviser of the CPND, the author of the present study.

Extension of the ICHL

From the ICHL's first meeting it became evident that apart from the Ministries initially represented there were others equally interested in some of the measures of implementation, for instance both Ministries of Education and the Ministries of the Communities and the Regions.

National Education

It appeared very soon that among the various measures of implementation the dissemination of international humanitarian law was a top priority and that education thus had a major role to play.

The Ministers of Education — at that time National Education, and currently the Community Executive members who are in charge of educational issues — have been represented on the Commission since June 1987.

Communities and Regions

Several years ago Belgium became a federal State consisting of three Communities and three Regions.

On various occasions at the ICHL's meetings, reference has been made to the participation of the Communities and the Regions in the Commission's activities and even to an extension of the latter to the advantage of these public law entities. Now that education has come within the competence of the Communities, it has become even more imperative to settle the matter of official participation of the Communities in the ICHL's activities. But this also holds true for various aspects of public health, the protection of cultural property and the dissemination of humanitarian law.

This issue was submitted to the Prime Minister on 19 December 1988 and has been raised on several occasions since then. The political authorities concerned have not taken any fundamental decision in the matter so far.

The ICHL's terms of reference

According to the decision of the Council of Ministers which set up the ICHL, the latter's task consists in "drawing up a complete inventory of the measures to be taken" and in "following up and co-ordinating the finalization of the texts required by the competent Ministries".

In practice, the ICHL's activities mainly consist in examining the Additional Protocols (and, if need be, the Geneva Conventions), in determining the measures to be taken at national level with a view to the implementation of these texts and, finally, in making proposals to the political and administrative authorities involved in the implementation of international humanitarian law.

The implementation of this law is therefore incumbent on these political and administrative authorities. As for the ICHL itself, it does not have any executive power. It confines itself to co-ordinating and occasionally stimulating the action of the various Ministries concerned and to making appropriate proposals. It is also entrusted with following up the measures of implementation decided upon by competent authorities.

The ICHL's working methods

In order to discharge its mandate, the ICHL has drawn up a "table of measures to be taken". This table, modelled on the indicative list drawn up by the ICRC, sets out, in forty-two items, the provisions of the Additional Protocols — accompanied where necessary by the provisions of the Geneva Conventions — which require measures of implementation. A distinction has been made between the provisions calling for priority measures of implementation and those for which measures are to be studied with a view to progressive implementation. For each area requiring measures of implementation, the relevant ministerial departments have been identified, among them the "pilot" department. The latter is entrusted with formulating proposals for legal or practical measures which must be taken at national level. To this end, it convenes the representatives of the various departments concerned and, when appropriate, experts and other specialists to be consulted. A working document is drawn up and submitted to the ICHL for consideration, discussion and approval. On the basis of this approved working document, measures of implementation are proposed to the authorities concerned. The approved working document is regularly

updated. The "table of measures to be taken" lists these working documents either as drafts or as approved by the ICHL.

The layout and numbering of these working documents correspond to a model annexed to the ICHL's internal regulations. For each measure, the relevant working document specifies its content, its legal basis and the departments concerned. It then analyses the probable budgetary implications, the stage reached in the matter and the proposals for decision.

The ICHL's working procedure

The Commission drew up its own internal regulations, which were approved at its 16 June 1987 meeting. New regulations were adopted on 29 May 1990; they came into force on 1 June 1990. A description of the Commission's working methods has been attached to them.

In order to facilitate the Commission's work, the Belgian Red Cross has offered to co-operate and has made its premises available for the Commission's meetings. The Red Cross is entrusted with keeping the minutes of the Commission's plenary sessions.

Each year the ICHL draws up a report on its activities which is sent to the members of the Government and to the Community Executives represented on the Commission.

The ICHL's headquarters are at the Egmont Palace in Brussels, in the premises of the CPND. Its meetings, however, are held at the Belgian Red Cross headquarters once a month. The Commission's first meeting took place on 12 May 1987. Between that date and the end of 1990, the Commission met thirty-three times.

Brief review of the ICHL's activities [13]

Qualified personnel

One of the first measures for implementation of international humanitarian law studied by the ICHL was the appointment of qualified personnel, as recommended in Article 6 of Additional Protocol I.

[13] Only a summary of ICHL activities is given here. We are, however, preparing a detailed account of the Commission's work.

Among such qualified personnel are the Ministers' representatives within the ICHL, together with the experts participating in the Commission's work. The legal advisers in the armed forces, referred to below, can also be considered as qualified personnel. The ICHL has also contacted the academic staff of the Belgian universities in order to establish a provisional list of qualified personnel, i.e., university professors who are specialists in international humanitarian law. On 18 May 1988 this list was sent to the ICRC through diplomatic channels.

Those appearing on the list of qualified personnel are regularly invited to activities (conferences, debates, courses, etc.) organized by the Belgian Red Cross, as well as to some ICHL meetings.

Legal advisers in the armed forces

Another measure of primary importance which has been examined by the ICHL is the implementation of Article 82 of Additional Protocol I relating to legal advisers in the armed forces.

The implementation of this provision involves the setting up, in peacetime, of a body of legal advisers, in determining their competences and in arranging for their training. This issue was on the agenda of the Symposium held by the Belgian Red Cross in November 1986.[14]

The proposals made in this respect by the general staff of the armed forces to the Minister of National Defence were approved by the latter on 18 September 1987. After a transitional period of about two years from 1 October 1987,[15] the system was instituted early in 1990.

A "law of war" section has been set up at the general staff headquarters. Advisers — known as "advisers in the law of war" — are to be attached to the general staff of the three Armed Forces, the medical service and large units. They are regular and reserve officers of the "operations" section. These officers are therefore fully integrated into the general staff and can advise commanders in the application of the law of war, the planning and conduct of operations and the dissemination of international humanitarian law.

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[14] An introductory report by G. Van Gerven and a report on activities in this field by J. F. Elens are published in *The Military Law and Law of War Review*, 1988, pp. 247-293 and 347-353 respectively.

[15] For this matter, see R. Remacle, *op. cit.*, note 11 above, pp. 105-124, and the Belgian report drafted in answer to the questionnaire on the implementation of international humanitarian law, at the XIth International Congress of the International Society for Military Law and the Law of War, *op. cit.*, note 1 above, pp. 99-100.

In order to train the advisers, a special course on the law of war has been organized at the Royal Defence College every year since 1988.

Moreover, information sessions and a course on the law of war are planned at all levels of the military hierarchy (officers, non-commissioned officers, soldiers) and throughout the servicemen's military career, in the form of both basic education and in-service training. To this end, appropriate teaching aids have been developed.

Repression of grave breaches

One of the priority measures of implementation examined by the ICHL pertains to the repression of grave breaches of international humanitarian law.

As early as 1963 the Belgian Government submitted a bill to Parliament concerning the repression of grave breaches of the Geneva Conventions.

Subsequently, in view of the imminent adoption of the Additional Protocols, the first of which adds to the list of grave breaches, the Government decided to suspend the parliamentary procedure related to that bill.[16]

In 1981, a bill inspired by the 1963 bill but tailored to the new provisions of Additional Protocol I was drafted by a working group set up on the initiative of the Seminar on military penal law and the law of war. This new text was handed over to the Minister of Justice in 1982.[17]

At the November 1986 Symposium, the work of one of the commissions focused on the repression of grave breaches.[18]

Since its inception in 1987, the ICHL has ceaselessly endeavoured to persuade the Government to submit a new bill in this matter.

The repression of grave breaches was again put on the agenda of the Forum on international humanitarian law organized by the Belgian Red Cross on 8 May 1989.[19] On that occasion, the Minister of Justice, Mr.

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[16] On this matter, see A. Andries, "The implementation....", *op. cit.*, note 1 above, pp. 272-273; J. Verhaegen, "Le vote du projet de loi belge No. 577 (1962-1963), un enjeu international", *Journal des tribunaux,* 1982, pp. 226-230.

[17] See A. Andries, "Chronique annuelle de droit pénal militaire (1982)", *Revue de droit pénal et de criminologie,* 1983, pp. 906-908.

[18] An introductory report by J. Verhaegen and a report on activities in this field by A. Andries are published in *The Military Law and Law of War Review,* 1988, pp. 227-238 and 329-341 respectively.

[19] See L. De Wever, "Een verjaardag....", *op. cit.*, note 11 above, p. 167; M. Orianne, "Célébrer le 8 mai par un geste humanitaire", *Contact (Croix-Rouge de Belgique, Communauté francophone*), 1989, No. 3, p. 4; A. Andries and F. Gorlé, "Chronique... (1988-1989)", *op. cit.*, note 6 above, pp. 961-962; F. Gorlé and A.

M. Wathelet, took the floor and stated that he would very shortly submit a new draft bill to the Council of Ministers. On 30 June 1989, this text was submitted to the Council of Ministers, which approved it. The draft bill was sent to the Council of State for its advice on 6 July 1989. The bill can be submitted to Parliament only after the Council of State has given its advice.

International Fact-Finding Commission

The Act of 16 April 1986 approving the Additional Protocols contained a provision whereby the King was entitled to subscribe to a statement acknowledging, on behalf of the Kingdom of Belgium, the competence of the International Fact-Finding Commission provided for in Article 90 of Additional Protocol I.

On 27 March 1987 the depositary State received Belgium's declaration of acceptance of the Commission's competence. Belgium was the eighth State to make this declaration. The ICHL has started examining the measures of implementation (mainly of a financial, administrative and even legislative nature) resulting therefrom.

Dissemination of international humanitarian law

The dissemination of international humanitarian law is one of the most important prerequisites for the actual application of the law and, consequently, for the protection of the victims of armed conflict. Dissemination, which should be carried out already in peacetime, represents the keystone of measures of implementation.[20]

Back in November 1986, at the Symposium organized by the Belgian Red Cross, one of the topics discussed was dissemination.[21] It was also on the agenda of the Forum on international humanitarian law of 8 May 1989.[22] The ICHL has listed dissemination among the measures of implementation to be considered as a priority.[23] It has

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Andries, "Kroniek... (1988-1989)", *op. cit.*, note 11 above, p. 657.

[20] See in particular, apart from the relevant provisions of the Conventions and the Additional Protocols, Resolution 21 of the Diplomatic Conference that adopted the Additional Protocols. See also Resolution IV of the XXVth International Conference of the Red Cross, adopted in Geneva on 31 October 1986. This Resolution is published in the *IRRC*, No. 225, November-December 1986, pp. 344-346.

[21] The introductory report by G. Genot and the report on the activities in this field by M. Van Coppenolle are published in *The Military Law and Law of War Review*, 1988, pp. 303-322 and 359-363 respectively

[22] See L. De Wever, "Een verjaardag...", *op. cit.*, note 11 above, pp. 167-169; M. Orianne, «Célébrer le 8 mai...», *op. cit.*, note 19 above, p. 4.

[23] On dissemination in Belgium, see in particular C. Vandekerckhove,

identified the various target groups, the corresponding levels of knowledge required and methods and means of dissemination. These measures of implementation should be considered in conjunction with the incorporation of advisers on the law of war in the armed forces and the appointment of qualified personnel.

As concerns dissemination within the armed forces, this measure is largely covered by the steps taken to appoint advisers on the law of war, who are responsible for education and dissemination within the Armed Forces. With regard to dissemination in the civil service, initiatives have been taken in several Ministries to allow civil servants and members of related bodies (magistrates, diplomats) to attend courses on humanitarian law organized by the armed forces or by the Belgian Red Cross.

Dissemination in the medical, paramedical and nursing professions is still under consideration, as it is in the educational sector, which now falls within the competence of the Communities.

Dissemination of international humanitarian law is undoubtedly the responsibility of the States party to the relevant treaties, in this case the Belgian State. However, taking into account the experience of the Belgian Red Cross in that area, the ICHL feels that dissemination among the general public could be carried out by the authorities in co-operation with the National Red Cross Society.

A proposal has been made to set up a permanent dissemination unit at the Belgian Red Cross, to operate under the supervision of the ICHL. The unit's main tasks could be to define needs in the field of dissemination, to plan information programmes and to implement the projects accepted.

Such activities, however, would entail an agreement between the Belgian Government and the National Red Cross Society on their respective roles, the terms of their co-operation and how the necessary financial resources are to be made available.

Other measures

Among the other measures to implement international humanitarian law examined by the ICHL, special mention should be made of steps to ensure the compliance of new weapons (Article 36 of Additional Protocol I); the definition of members of the armed forces (Article 43);

"Dissemination of international humanitarian law...", *op. cit.*, note 5 above, pp. 277-281; G. Hullebroeck, "The dissemination...", *op. cit.*, note 5 above, pp. 178-181; E. David, "Dissemination of international humanitarian law at university level", *IRRC*, No. 257, March-April 1987, pp. 155-167; L. De Wever, *Het Rode Kruis..., op. cit.*, note 11 above, pp. 5-8.

determination of the status of persons who have taken part in hostilities (Article 45); the protection of cultural objects and places of worship (Article 53);[24] the duties of military commanders (Article 87); the repression of breaches which are not qualified as grave and of breaches resulting from a failure to act (Article 86); measures indispensable for the application of the Third Geneva Convention relating to the treatment of prisoners of war; the setting up of a National Information Bureau as provided for in the Third and Fourth Geneva Conventions.

Final remarks

After more than three years of work, the ICHL has achieved very positive results. This interdepartmental body set up in 1987 to examine measures of implementation of international humanitarian law has proved to be an ideal forum for a co-ordinated examination of such measures. The participation of the Belgian Red Cross in ICHL activities is undoubtedly a great asset.

Although Belgium has, thanks to these initiatives, come to be regarded as a "pilot State" in the field of implementation, much remains to be done. Indeed, the progress of the Commission's work depends to a large extent on the support of each of the participating Ministries. Moreover, it often depends on decisions the competent authorities have to take. But there can be no doubt that the Commission's efforts will very soon bear fruit.

Marc Offermans

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[24] In this connection the ICHL also examined the measures of implementation that are required by the Convention for the Protection of Cultural Property in the Event of Armed Conflict, adopted in The Hague on 14 May 1954 and approved in Belgium by Act of 10 August 1960 *(Moniteur belge* of 16-17 November 1960).

The International Fact-Finding Commission

ARTICLE 90 OF PROTOCOL I ADDITIONAL TO THE 1949 GENEVA CONVENTIONS

by J. Ashley Roach*

I. INTRODUCTION

The United States considers many provisions of Protocol I additional to the Geneva Conventions of 1949[1] to be either statements of customary international law or to reflect what that law should be.[2] It is in that vein that the United States views Article 90 on the International Fact-Finding Commission. The U.S. Joint Chiefs of Staff (JCS) military analysis of the Protocols expressed the views of the U.S. Department of Defense on Article 90 as follows:

"One major innovation of the Protocol is the creation of a permanent 15-member International Fact-Finding Commission to investigate alleged grave breaches or serious violations of the Protocols and the Conventions and to facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and [the] Protocol".[3]

The JCS analysis correctly notes the Commission's major limitation, i.e. that it

"cannot act... without the consent of the parties to the dispute. Such consent can be given either on a one-time, permanent basis or on an ad hoc *basis for a particular dispute".*[4]

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See pp. 182-189 for notes and references.

In 1986 the United States JCS predicted:

"Given the persistence of the Soviet refusal to allow third-party supervision of the Geneva Conventions, it is extremely unlikely that either the USSR or any of its allies or clients would consent to the activities of the Commission".

Many must then have been surprised when, on 29 September 1989, in conjunction with its ratification of both Protocols, the USSR accepted *ipso facto* the competence of the Fact-Finding Commission to be established under Article 90 of Protocol I when 20 States party have accepted said competence. Byelorussia and the Ukrainian SSR quickly followed suit, bringing the total to 18 acceptances. On 20 May 1990, Uruguay — already a party to Additional Protocol I — accepted the competence of the Fact-Finding Commission. Then, on 20 November 1990, Canada became the twentieth State to accept the competence of the Fact-Finding Commission when it deposited its instrument of ratification of Additional Protocol I. Several other States, including the Federal Republic of Germany,** have signaled their intention to follow suit in the near future.

Thus, of the 99 nations to have ratified or acceded to Protocol I, as at 31 January 1991, the other nations to have so far accepted the competence of the Fact-Finding Commission include some most unlikely adversaries in the post-Cold War era: the neutrals (Austria, Finland, Sweden and Switzerland), other smaller NATO allies (Belgium, Denmark, Iceland, Italy, Netherlands, Norway and Spain), and Algeria, Liechtenstein, Malta and New Zealand. Nevertheless, those acceptances are not pointless, for a State which requests an enquiry need not be the victim of a violation, it only has to have accepted the competence of the Commission.[5] More about that later.

The JCS study paradoxically continued:

"Historically, the United States has consented to the jurisdiction of such bodies on a permanent basis (e.g., the World Court in The Hague [recognition subsequently modified in 1984 and terminated in 1986 in connection with the ICJ litigation involving the mining of Nicaraguan harbors[6]], and the US Government would presumably do so again if it ratifies the Protocol".

On the other hand, the JCS analysis, after reviewing all the compliance mechanisms set out in Protocol I, pessimistically concluded:

** [Ed.] On 14 February 1991, the Federal Republic of Germany ratified the Protocols. It is the twenty-first State to make the declaration accepting the competence of the International Fact-Finding Commission.

"While the compliance articles are acceptable, the Protocol has not significantly improved the international machinery for ensuring compliance with international humanitarian law in armed conflict. The United States did not, therefore, achieve its most important negotiating objective in participating in the Protocol negotiations".[7]

With that decidedly downbeat introduction, my analysis turns to the challenges of inquiry procedures. This is an opportune time to do so, because there are now the requisite 20 acceptances of the competence of the Fact-Finding Commission,[8] and the Swiss Government is required under Article 90 to start the prescribed steps to bring life into this hope.

II. TYPES OF FACT-FINDING

To assist the reader in understanding the unique character of the Fact-Finding Commission, let me briefly describe other types of fact-finding extant in the world today.

Judicial fact-finding involves a determination on the basis of facts presented by the opposing sides. Examples in the international arena include the International Court of Justice and the European Court of Human Rights. The court does not go out and gather the facts, and generally does not appoint others to do so for the court.

Another type of fact-finding involves an investigative body going out to uncover the facts based on allegations presented from outside the organization. Examples include the inquiries by the special representatives of the UN Secretary-General into the use of gas in the Iran-Irak conflict;[9] activities by the European and Inter-American Commissions on Human Rights; and the activities of non-governmental organizations such as *Amnesty International, Africa Watch, Asia Watch, and Americas Watch.*[10]

A third form of fact-finding could be called preventive fact-finding. Here an organization investigates a situation (not an allegation) with a view to preventing abuses. The ICRC frequently engages in this type of activity,[11] which also occurs under the European Convention of the Prevention of Torture.[12] This method can, of course, be combined with investigative fact-finding, but does not require a prior allegation of abuse.

Finally, some State representatives abroad report back to their own governments on the human rights record in their place of assignment, for domestic purposes. For example, the U.S. State Department

publishes annual *Country Reports on Human Rights Practices*, which include reports on countries in which armed conflicts are occurring.

As we shall see, the Fact-Finding Commission is a unique combination of aspects of these three models.

III. ESTABLISHMENT OF THE COMMISSION

A. Role of the depositary

Initial steps to form the Commission may only be taken "when not less than" twenty High Contracting Parties (i.e. States) to Protocol I have agreed, by virtue of a declaration, that they "recognize *ipso facto* and without special agreement, in relation to any other High Contracting Party accepting the same obligation", the competence of the Commission.[13] It is to be presumed that the organizers do not have to act immediately on deposit of 20 such acceptances; there would seem to be no objection to waiting a reasonable period of time to begin the process, if that seems appropriate.

Article 90, para. 1 (*b*) places the depositary in charge of initiating the process of forming the Commission. Consequently the Swiss Federal Council,[14] designated depositary by Article 93, is now required to "convene a meeting of representatives of those High Contracting Parties" which have accepted the competence of the Commission "for the purpose of electing the [15] members of the Commission." A strict reading of Article 90, para. 1 (*b*) suggests that only those few States can be represented on the Commission. However, the meeting is charged to elect members so that the "Commission as a whole" reflects "equitable geographical representation." So far no State from Asia, and only one State each from Africa and from Latin America, have signed on, making it very difficult to meet the criterion of "equitable geographical representation" by electing nationals from those countries accepting the competence of the Fact-Finding Commission. Hence, one can argue the need to wait until at least one State from each of the regional groupings has accepted the competence of the Commission before convening the initial meeting.

On the other hand, at the 15th Round Table of the International Institute of Humanitarian Law, a representative of the Swiss Government suggested that it would begin the process promptly after deposit of the 20th acceptance. The Swiss representative suggested that States may wish to take roughly three months to exchange information about potential nominees before submitting formal nominations. He proposed

that approximately one month later the election meeting be held in Bern or Geneva. That way his Government would be able to send the list of 20 names and nationalities to the 20 States one month before the meeting.[15] Some participants in the Round Table suggested that might be an overly optimistic timetable for convening the election meeting.

B. Qualifications of candidates for election as members of the Commission

In this connection let us consider what may be the nationality of the members. The High Contracting Parties attending the constitutive meeting called by the depositary may nominate one person each. However, Article 90 does not require the member to be of the same nationality as the State that nominates him or her. The requirement for "equitable geographical representation" would seem to permit States to reach beyond their borders to satisfy that criterion. If so, then perhaps the depositary need not wait until at least one State from each geographical region has accepted the competence of the Commission before calling the initial meeting, if it has reason to believe that the criterion of geographical representation will be met in this way.

What conditions, besides geographical diversity, must candidates meet to be elected members of the Commission? Article 90, para. 1 (*d*) requires only that each member ("individually") be of (1) "high moral standing" and (2) "acknowledged impartiality". Both criteria are obviously necessary to ensure the credibility and effectiveness of the Commission's Chambers. They follow the example set in fact-finding commissions established under other international agreements, such as the committee established under Article 8 of the International Convention on the Elimination of all Forms of Racial Discrimination.[16]

What other criteria may be implied? The competence of the Chambers is to enquire into any facts alleged to be a "grave breach" or other "serious violation" of the 1949 Geneva Conventions for the Protection of War Victims and of Additional Protocol I thereto. Hence the members of the Commission must be knowledgeable about what acts constitute "grave breaches" and "serious violations". Some at least should be international lawyers, perhaps even judge advocates, with expertise in international humanitarian law. The members will also need access to relevant scientific, medical and military expertise, if

they do not already possess it. The Swiss representative at the Round Table suggested that the nomination of government officials should be considered only if no other qualified candidates were available, since it was imperative that the Commission conduct its enquiries in an atmosphere of political independence.

C. Conduct of the election

Once the meeting of representatives is convened, it is strictly limited in purpose to electing the members of the Commission. Nothing else is within the meeting's competence.

The 15 members are to be elected by secret written ballot. However, there is no indication of what size vote is required for election. The norm would seem to be that of a simple majority, in the absence of a requirement for a larger majority or unanimity. The Swiss representative at the Round Table suggested following the rules set out in the 1966 Covenant on Civil and Political Rights for the election of the Human Rights Commission. Article 30(4) requires a quorum of two-thirds to conduct the election and an absolute majority of the representatives present and voting to elect each member of that Commission. States will have to agree on the rules before conducting the initial election of members. Those rules should also provide for the selection from among the representatives of an *ad hoc* President of the election meeting. Perhaps a draft of the rules should be circulated to States at the time the call for nominations is issued.

Elected members are required to serve as individuals in their personal capacity for terms of five years and until their replacements are elected.[17] Vacancies are to be filled by the Commission from the list of those nominated by the High Contracting Parties but not previously elected, while still maintaining "equitable geographical representation".[18]

IV. ORGANIZATION OF THE COMMISSION

A. Selection of an *ad hoc* President

Article 90, para. 6 provides that the Commission "shall establish its own rules, including rules for the presidency of the Commission." Logically, the President should be elected during the first formal meeting of the Commission.[19] The members may wish to consult infor-

mally among themselves, by phone, fax or in person, to agree on the procedures for the conduct of that first meeting. The first order of business of the initial meeting of the members of the Commission should then be to select an *ad hoc* President. His sole task should be to obtain the election from among members of the President of the Commission.

B. Election of the President of the Commission

Here again, the Commission members may wish to follow standard UN practice in electing the President from among themselves. Although Article 90 sets out no particular criteria for the Commission's President, he will likely need to be available at all times.[20]

C. Rules of Procedure of the Commission

Article 90, para. 6 provides that the "Commision shall establish its own rules, including rules for the presidency of the Commission and the presidency of the Chamber." The members will then need to draft those rules. Those rules will have to reflect the requirements of Article 90 as well as the impartiality and procedural probity required to promote acceptance of the Commission. Professor Tom Franck has suggested five key indicators of impartiality or procedural probity that should be reflected in the rules: (1) choice of subject, (2) choice of fact-finders, (3) terms of reference, (4) procedures for investigation, (5) utilization of product.[21] He suggests that the following procedural norms be respected to satisfy these objectives in drafting rules for fact-finding missions:

"A fact-finding mission should not begin its quest without clearly defined terms of reference that circumscribe the precise area in which it is to operate. These terms of reference should be neutrally stated in the form of questions of fact. The mission should insist that within this area it be free to apply the best available tools of perceptive objectivity, insulated from socio-political passions and assumptions.... Evidence should be taken in such a way as to facilitate informed cross-examination and rebuttal, and at the same time to protect witnesses against reprisal. The panel should have its own staff capable of researching issues as well as preparing agendas and itineraries independently. The fact-finders' on-site freedom of movement and

access should be assured ab initio. *Draft findings should be circulated to the parties for comment. The final product should accurately reflect the result, whether it is a consensus, a majority, or a wide diversity of views as to the facts. Members should be free to write separately or dissenting reports".*[22]

V. COMPETENCE OF THE COMMISSION

Now that we have some sense of how the Commission members will be chosen and how the Commission may organize itself, let me turn next to the competence of the Commission. The Commission is empowered to do two separate things: (1) enquire into certain facts, and (2) facilitate respect for the Conventions and Protocol I. First, what is the scope of a permissible enquiry?

A. Grave breaches and other serious violations

According to Article 90, para. 2 (*c*), the Commision is authorized to "enquire" into "facts" alleged to be a *grave breach* "as defined in the Conventions and this Protocol" or *other serious violations* of the Conventions or the Protocol.

The Commission is thus competent to enquire into facts and not to judge. If a submission regarding certain facts alleged to have taken place is made, the Commission must necessarily be competent to attempt to establish whether those facts took place.[23] The Commission does not have the power to issue a formal judgment on whether these facts, if found to have occurred, constitute a grave breach or serious violation.[24]

The Commission is not entitled to enquire into all violations as may occur in enquiries conducted pursuant to common Article 52/53/132/139.[25] The Commission is thus not competent to enquire into facts alleged to be only breaches, without being "grave breaches" or "serious violations". Further, in no case can a violation of other rules of armed conflict outside the Geneva Conventions and Protocol I, whether they are customary law or treaty-based, form the object of a request to the Commission.[26]

Grave breaches are defined in common Article 50/51/130/147,[27] and in Articles 11, paras 1-4 and 85, paras 2-4 of Protocol I.[28] On the other hand, serious violations are not explicitly defined in either the Conventions or Protocol I. The ICRC's commentary on Article 89 of

Protocol I (the only other place in Protocol I where the term "serious violations" is used) suggests the term refers to "conduct contrary to these instruments which is of a serious nature but which is not included as such in the list of 'serious breaches.'"[29] The *Commentary* suggests such violations include the following conduct:

- isolated instances of conduct, not included among the grave breaches, but nevertheless of a serious nature;
- conduct which is not included among the grave breaches, but which takes on a serious nature because of the frequency of the individual acts committed or because of the systematic repetition thereof or because of the circumstances; and
- "global" violations, for example, acts whereby a particular situation, a territory or a whole category of persons or objects is withdrawn from the application of the Conventions or the Protocol.[30]

Who is to judge that this threshold has been met (so that an enquiry can be launched)? How is one to decide if the threshold is met? Article 90 provides no guidance. The Commission will have to decide for itself.

B. Good offices

The other major role of the Commission is to "facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and this Protocol.[31] The term "good offices" involves the communication of conclusions on points of fact, comments on the possibilities of a friendly settlement, and written and oral observations by the States concerned.[32] The *ICRC Commentary* seems to suggest that the Commission need merely take "note" of such facts for it to bring its good offices to bear. It notes the requirement of subparagraph 5. (*a*) to submit a report to the Parties on the findings of fact and "such recommendations as it may deem appropriate" and recommends that such reports express only a "*prima facie* appraisal" and not include "elements of legal evaluation", even though the Commission will undoubtedly have first formed an opinion regarding non-respect.[33]

Thus it would seem entirely within the authority of the Commission, having noted certain facts which may not rise to the level of grave breaches or serious violations, to suggest ways to provide better protection. I submit the parties are more likely to take up these suggestions.

An example could be the occurrence of high civilian casualities. That fact does not in and of itself necessarily mean either that civilians have been targeted or that the hostilities have been conducted indiscriminately. Indeed, there may be no evidence of a grave breach or a serious violation. But the Commission should be able to recommend, if warranted, that the parties establish non-defended localities under special protection. Of course, if the Chamber finds evidence of a grave breach or serious violation, it should make that finding independently of any recommendation it may also wish to make.

On the other hand, it would not seem to be within the competence of the Commission for its President to exercise this power independently of any request for an enquiry.[34]

C. *Ad hoc* enquiries into grave breaches and serious violations

The Commission is to act on the request to it by States which have previously accepted the competence of the Commission. Thus the Commission cannot act on the request of entities other than States, such as the population of an occupied territory. The State which requests an enquiry will not — as noted in the Introduction — necessarily be the victim of a violation of the Conventions or Protocol I committed by an adverse Party which has also accepted the competence of the Commission. It merely must have recognized the competence of the Commission.[35]

The Commission may also act on requests by States that have not accepted the competence of the Commission generally *only* if the adverse Party consents, even if it had previously accepted generally the competence of the Commission.[36] Such requests can be made even by States that have not ratified or accepted Protocol I, such as the United States.[37]

VI. CHAMBERS OF ENQUIRY

Once a competent request for an enquiry has been received, Article 90 contemplates the enquiry being carried out quickly by a chamber of seven persons, five of them members of the Commission. For obvious reasons of fairness, none of those five may be nationals of *any* Party to the conflict.[38] The five persons are to be appointed by the President of the Commission on the basis of equitable representation of

geographical areas, after consultation with the Parties to the conflict.[39] While the *ICRC Commentary* suggests that the President of the Commission is not bound by the opinion of the Parties that have been consulted, a private commentator has suggested that appointment of a member not having the agreement of the Parties would jeopardize the success of the enquiry.[40]

The other two members are to be appointed *ad hoc*, one by each side; again, neither may be a national of *any* Party to the conflict.[41] They need not be members of the Commission; rather they "represent" the Party that has appointed them and "should contribute to creating an atmosphere of trust within the Chamber itself."[42] Since Protocol I is silent on this point, it is to be hoped that these *ad hoc* members would have credentials similar to those possessed by the other members of the Chamber. Failure to have these qualifications would only detract from the credibility and effectiveness of the Chamber and its work, but would not be disqualifying.

One problem not addressed in Article 90 is the international status of and protection granted to the members. There is no established requirement that they be granted diplomatic status yet they should receive some form of protection while they are conducting their enquiry "in country". Surely they are not mere tourists. I question whether they are true international civil servants. Perhaps there needs to be developed a model agreement for their status when conducting an enquiry in foreign territory.[43]

Article 90 provides a mechanism to counter attemps to delay activation of the Chamber by a State failing to appoint its *ad hoc* member. If one or both *ad hoc* members are not appointed within the time limit set by the President of the Commission, then the President shall immediately make the necessary appointment(s) himself (or herself) from the members of the Commission.[44] Article 90 provides no guidance on what that time limit should be. The *ICRC Commentary* notes the importance of the time limit set in Article 90, para. 3 (*b*) for the appointment of the *ad hoc* members:

"In time of armed conflict, the time taken by the body responsible for supervising compliance with the applicable rules may be crucial, not only for the fate of possible victims but also with regard to the risk of counter-measures being taken by the Party which considers itself wronged. ... Moreover, the longer matters drag on, the more difficult it may become to establish the facts precisely".[45]

Indeed, I would add that there is a great need to move rapidly to obtain evidence which in the nature of things disappear (e.g., use of chemical warfare or poison) or which may be removed easily.

Thus the *ICRC Commentary* is correct to admonish the President of the Commission to "react immediately to a request presented to him", and to appoint the two *ad hoc* members when the Parties fail to do so, "perhaps after attempting a final consultation with the Parties".[46] Perhaps the time limit should be set in the rules of procedure as hours or a few days; certainly it should never be weeks or months.

I should also note that the membership of five plus two applies not only to enquiries conducted on the request of parties which have accepted the competence of the Commission, but also to enquiries based on special agreement.[47]

VII. CONDUCT OF THE ENQUIRY

A careful reading of Article 90 will show that most of the foregoing is spelled out in the text of that article. Article 90 is, in contrast, noticeably less detailed in its prescription for the conduct by the Chamber of its enquiry.

A. Article 90, paragraph 4

Article 90, para. 4 (*a*) simply addresses three subjects. First, it states that the Chamber **shall** "invite the Parties to the conflict to assist it and to present evidence". Second, it says that the Chamber **may** also "seek such other evidence as it deems appropriate". And third, it provides that the Chamber **may** "carry out an investigation of the situation *in loco*".[48] Thus the Chamber may not completely exclude the parties from its enquiry. The Chamber must provide the parties with the opportunity to present evidence. The parties are not, however, required to do so. Further, the Chamber is not limited, as judicial fact-finding bodies generally are, to considering the evidence presented to it by the parties. Rather, the Chamber is authorized to seek out evidence on its own by travelling to the site, subject to entry approval. Failure to permit the Chamber to enter its territory with guarantees of safety will not help that State's case.

Since the Chamber can also make recommendations, it has been suggested that the Parties should be able to present legal arguments relevant to an evaluation of the evidence. For example, if

"an attack against forces for the adversary has also affected the civilian population, the State alleged to have committed a grave breach should be entitled to be heard with the argument that the principle of proportionality should be taken into account".[49]

B. Rules of procedure for conduct of the enquiry

Except on one point, Article 90 does not specify the procedures to be followed by the Chamber.[50] Hence it will be up to either the Commission to establish fact-finding procedures to be followed by all Chambers, or leave it to each Chamber to set up its own. I suggest the former is preferable, because of the urgency of getting on with each Chamber's work and the need for uniformity and credibility of the results of enquiries. Fortunately the Commission does not have to start from scratch. It may draw upon several model rules of procedure adopted by various UN bodies and others.[51] It bears stating the obvious that the rules should be drafted in such a way as to promote the successful achievement of the objectives of the Fact-Finding Commission and its Chambers.

VIII. REPORT ON THE RESULTS OF THE ENQUIRY

After the investigation is completed, the Chamber is required to prepare a "report on the findings of fact". That report must be "factual and impartial". If the Chamber is not able to secure sufficient evidence for such findings, it must provide those reasons to the Commission, for transmission to the Parties.[52] The Chamber's report is submitted to the Commission. The rules should state to whom the Chamber's report is to be submitted, the President or to the Commission as a whole. I recommend the former.

A question exists whether the Commission is to consider the Chamber's report and take action thereon, or whether the report should automatically receive the status of the Commission's report, as is the case under Article 27 of the Statute of the International Court of Justice? Under Article 90, the Commission is required to submit to the Parties the report "with such recommendations as it may deem appro-

priate".[53] May the Chamber draft or propose recommendations, or is that to be the exclusive function of the Commission? I would hope the Chamber would be permitted under its rules to bring to bear its familiarity with the facts and to make appropriate recommendations.

To arrive at recommendations, the Chamber and the Commission members will necessarily have to have legally evaluated the facts as they found them. Hence the membership will require, as I noted earlier, expertise in international humanitarian law as well as in warfare. The Commission's rules will have to address how it is to evaluate the Chamber's report, and how to arrive at recommendations. Those rules should provide that the members of the Commission will be given the opportunity to examine the report of the Chamber and to propose recommendations, and for individual members to record any dissent from the majority view. Similarly, the rules should also deal with attachment to the report of the opinions of members of the Commission who do not agree with the report or the recommendations. Certainly, any recommendations made by the Commission must be within the competence of the Commission's work and made with a view toward mitigating, not aggravating, the situation.

Although there was great debate at the Diplomatic Conference over the merits and demerits of making the report public, Article 90, para. 5 (*c*) **clearly provides that the Commission may** *not* report the findings publicly, unless *all the Parties to the conflict* — not just the parties to the investigation — have requested the Commission to do so. It has been suggested that when such a request for release of the "findings" is received, the report as a whole "as well as its constitutive elements" are to be released.[54]

Once the rules have been adopted by the Commission, copies should be sent to all States for their information and consideration. States which have not accepted the competence of the Commission may thus be encouraged by properly drafted rules to file the necessary declaration.

IX. EXPENSES OF THE COMMISSION AND ITS CHAMBERS

Administrative assistance to the Commission is to be provided by the Swiss Government as depositary.[55] On the other hand, Article 90, para. 7 provides that the administrative expenses of the Commission shall be met (1) by contributions from the High Contracting Parties who have accepted the competence *ipso facto* of the Commission, and

(2) by voluntary contributions. One respected commentator suggests administrative facilities to be made available by the depositary are the necessary rooms, interpreters and precis-writers, but not the travel expenses of the members. Apparently, such expenses would be met in accordance with paragraph 7.[56] Other items needed include video-recording and word-processing equipment.

Unlike the International Covenant on Civil and Political Rights, Article 90 makes no provision for the advance of initial expenses of the members of the Commission.[57]

Article 90 does not indicate how the expenses of the Commission are to be apportioned among the States accepting the competence of the Commission. Perhaps the apportionment can be modeled on the practice in financing review conferences, i.e. apportioning the expenses in accordance with the scale of assessment of the United Nations regular budget adjusted to take into account differences between the United Nations membership and the participation of States taking part in the Commission. Adjustment would also have to be made for the participation of States not members of the UN, such as Switzerland.

The Commission will presumably also need to adopt a budget and appropriate financial accounting methods.

Although Article 90 states that the expenses of the Commission may also be met by voluntary contributions, it does not expressly limit the contributors to States or States party. The Commission will need to determine if it may accept contributions from governmental and non-governmental international organizations or from the private sector.[58]

The expenses of a Chamber are to be met differently — exclusively from the parties using its services. The party or parties to the conflict requesting an enquiry are required to advance the necessary funds for expenses to be incurred by a Chamber. They are to be partially reimbursed by the party or parties against which the allegations are made, to the extent of 50% of the costs of the Chamber, whether or not the allegations are true.[59] Article 90 provides no other guidance on how to determine the amounts.

Where there are counter-allegations before the Chamber, each side is required to advance half of the necessary funds.[60]

X. CONCLUSION

Twenty States have now accepted *ipso facto* and without special agreement the competence of the Fact-Finding Commission. The Government of Switzerland, as the depositary of Additional Protocol I,

is taking the first steps necessary to bring the Fact-Finding Commission into being. It is hoped this article will assist those responsible for taking the many decisions that will shape and guide the Fact-Finding Commission as it undertakes its important responsibilities. For, as Professor Kalshoven has written, "the activities provided for the Commission may be expected to contribute considerably to the speedy and fair settlement of disputes arising from allegations of serious violations of the Conventions or the Protocol, and to the reduction of tensions attending such allegations".[61]

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NOTES AND REFERENCES

[1] *International Legal Materials*, Washington, D.C., November 1977, vol. 16, pp. 1371 *et seq.* For a discussion of the U.S. decision not to ratify Protocol I, see "Agora", *American Journal of International Law*, Washington, D.C., October 1987, vol. 81, pp. 910-25 and *id.*, October 1988, vol. 82, pp. 784-87.

[2] *Proceedings of the American Society of International Law*, Washington, D.C., 1987, vol. 81, pp. 28-31 (remarks of U.S. Department of State Deputy Legal Adviser Matheson); "The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols additional to the 1949 Geneva Conventions", *American University Journal of International Law and Policy*, Washington, D.C., 1987, vol. 2, p. 428 (remarks of U.S. Department of State Deputy Legal Adviser Matheson).

[3] Article 90 originated in two proposals, one made by Pakistan and the other made jointly by Denmark, New Zealand, Norway and Sweden. Both proposals stated that when a request for an inquiry was made by a party to the conflict, such an inquiry would be conducted and would not be subject to veto by the other side, either directly or indirectly. As was to be expected, early in the discussions the concerns for "violation of national sovereignty" and "interference in internal affairs" were raised by the Communist countries (H. Levie, *Protection of War Victims*, Dobbs Ferry, N.Y., Oceana, 1977, vol. 4, pp. 390 (paras. 1-9), 394 (paras. 35-36), 395 (paras. 40-43, etc.). "As a result the article as adopted is, once again, completely consensual and will probably be no more effective than the common article of the 1949 Geneva Conventions

and its predecessor have proved themselves." H. Levie, *The Code of International Armed Conflict*, Dobbs Ferry, N.Y., Oceana, 1986, vol. 2, p. 878.

Common Article 52/53/132/149 of the 1949 Geneva Convention provides that "at the request of a Party to the conflict, an enquiry shall be instituted" concerning any alleged violations thereof. Although the *ICRC Commentary* considers this to be "obligatory" (*The Geneva Conventions of 12 August 1949 — Commentary*, under the editorship of Jean Pictet, ICRC, Geneva, 1960, vol. III, p. 632), no such inquiry has ever been conducted and it is extremely doubtful that one ever will be, as it is so very easy for the party alleged to have committed the violations to prevent the inquiry from being conducted. It can do so by refusing to agree to a procedure and then by refusing to agree to the choice of an umpire. Article 30 of the 1929 Geneva Convention contained the identical "obligatory" wording ("an enquiry shall be instituted") and there is no public record of any inquiry ever having been conducted thereunder. *Id.*, pp. 878, 874. See note 25 below. See also T. J. Murphy, "Sanctions and Enforcement of the Humanitarian Law of the Four Geneva Conventions of 1949 and Geneva Protocol I of 1977," *Military Law Review*, Charlottesville, Va., 1984, vol. 103, p. 3.

[4] In one respect Article 90 is an improvement on past efforts. Paragraph 3, providing for the designation of the members of the Chamber which is to make an investigation, is so drafted that it will be impossible for an alleged violator which has filed a declaration or has agreed to the investigation, to prevent the establishment of the Chamber and the investigation by refusing to name an *ad hoc* member. See text accompanying notes 44-46 below.

[5] M. Bothe, K. J. Partsch & W. A. Solf, *New Rules for Victims of Armed Conflicts*, The Hague, Nijhoff, 1982, para. 2.12, p. 543.

[6] *International Legal Materials*, May 1984, vol. 23, p. 670; *U.S. Department of State Bulletin*, January 1986, p. 67; *International Legal Materials*, November 1985, p. 1742.

[7] The JCS analysis continued:

"This conclusion lends greater importance to the earlier recommendation that the limits on reprisals in Articles 51-56 be reserved. If the United States cannot rely on neutral supervision to ensure compliance with humanitarian law, then the threat of unilateral retaliation retains its importance as a deterrent sanction to ensure at least a minimum level of humane behavior by US adversaries".

[8] Communication to the author from Commander W. Fenrick, CF, Office of the Judge Advocate General, Ottawa, November 21, 1990.

[9] Reports of the Mission Dispatched by the Secretary-General to Investigate Allegations of the Use of Chemical Weapons in the Conflict Between the Islamic Republic of Iran and the Republic of Iraq, UN Docs. S/16433 (1984); S/17127 and Add. 1 (1985); S/17911 and Corr. 1 and Add. 1 and 2 (1986); S/18852 and Add. 1 (1987); S/19823 and Corr. 1 and Add. 1, 25 April 1988; S/20060, 20 July 1988, and S/20063, 25 July 1988. These reports led to vigorous condemnation of the use of chemical weapons, albeit without assigning responsibility to one side, in Security Council Resolution 612, 9 May 1988, *U.S. Department of State Bulletin*, July 1988, p. 69. Similar reports have been submitted regarding the treatment of prisoners of war: Prisoners of War in Iran and Iraq: The Report of a Mission Dispatched by the Secretary-General, January 1985, UN Doc. S/16962*, 22 February 1985, and The Report of the Mission Dispatched by the Secretary-General on the Situation of Prisoners of War in the Islamic Republic of Iran and the Republic of Iraq, UN Doc. S/20417, 24 August 1988.

[10] See, *e.g.*, the Report of the Independent Counsel on International Human Rights on the Human Rights Situation in Afghanistan, attached to UN Doc. A/C.3/42/8, 17 November 1987.

[11] The ICRC has issued guidelines to govern its activities in the event of breaches of the law ("Action by the International Committee of the Red Cross in the Event of Breaches of International Humanitarian Law," *International Review of the Red Cross*, No. 221, March-April 1981, pp. 81-83):

"1. **Steps taken by the ICRC on its own initiative**

General rule: The ICRC shall take all appropriate steps to put an end to violations of international humanitarian law or to prevent the occurrence of such violations. These steps may be taken at various levels according to the gravity of the breaches involved.

However, they are subject to the following conditions:

Confidential character of steps taken: In principe these steps will remain confidential.

Public statements: The ICRC reserves the right to make public statements concerning violations of international humanitarian law if the following conditions are fulfilled:

- the violations are major and repeated;
- the steps taken confidentially have not succeeded in putting an end to the violations,
- such publicity is in the interest of the persons or populations affected or threatened;
- the ICRC delegates have witnessed the violations with their own eyes, or the existence and extent of those breaches were established by reliable and verifiable sources".

The ICRC made public representations regarding the Iran-Iraq war. See *International Review of the Red Cross*, No. 235, July-August 1983, pp. 220-22 (press release of 11 May 1983 describing appeal of 7 May 1983 to the nations party to the Geneva Conventions); *id.*, No. 239, March-April 1984, pp. 113-15 (press release of 15 February 1984 regarding appeal to governments of 10 February 1984); *id.*, No. 243, November-December 1984, pp. 357-58 (press release describing appeal to governments of 24 November 1984). The ICRC issued a press release on misuse of the red cross emblem in Lebanon, *id.*, No. 248, September-October 1985, pp. 316-17; and a press release on the Afghan conflict on 20 May 1984, *id.*, No. 241, July-August 1984, pp. 239-40.

The ICRC Guidelines further provide:

Special rule: The ICRC does not as a rule express any views on the use of arms or methods of warfare. It may, however, take steps and, if need be, make a public statement if it considers that the use or the threat to make use of a weapon or method of warfare gives rise to an exceptionally grave situation.

Such situations arose during the course of the Iran-Iraq war. ICRC, *Annual Report 1984*, pp. 60-61 (7 March 1984, report on the use of prohibited weapons, and 7 June 1984, press release on the bombing of Iraqi and Iranian cities); *International Review of the Red Cross*, No. 257, March-April 1987, p. 217 (appeal of 11 February 1987 regarding bombing of cities); ICRC, *Bulletin*, No. 147, April 1988, p. 4 (10 March 1988, press release protesting against bombing of cities, and 23 March 1988, press release condemning use of chemical weapons in the province of Sulaymaniyah).

The ICRC Guidelines continue:

2. **Reception and transmission of complaints**

Legal basis: In conformity with article 6, para. 4 of the Statutes of the International Red Cross, the ICRC is entitled to take cognizance of "complaints regarding alleged breaches of the humanitarian Conventions".

Complaints from a party to a conflict or from the National Society of a party to a conflict: The ICRC shall not transmit to a party to a conflict (or to its National Red Cross or Red Crescent Society) the complaints raised by another party to that conflict (or by its National Society) unless there is no other means of communication and, consequently, a neutral intermediary is required between them.

Complaints from third parties: Complaints from third parties (governments, National Societies, governmental or non-governmental organizations, individual persons) shall not be transmitted.

If the ICRC has already taken action concerning a complaint it shall inform the complainant inasmuch as it is possible to do so. If no action has been taken, the ICRC may take the complaint into consideration in its subsequent steps, provided

that the violation has been recorded by its delegates or is common knowledge, and in so far as it is advisable in the interest of the victims.

The authors of such complaints may be invited to submit them directly to the parties in conflict.

Publicity given to complaints received: As a general rule the ICRC does not make public the complaints it receives. It may publicly confirm the receipt of a complaint if it concerns events of common knowledge and, if it deems it useful, it may restate its policy on the subject.

3. **Requests for inquiries**

The ICRC can only take part in an inquiry procedure if so required under the terms of a treaty or of an *ad hoc* agreement by all the parties concerned. It never sets itself up, however, as a commission of inquiry and limits itself to selecting, from outside the institution, persons qualified to take part in such a commission.

The ICRC shall moreover not take part in an inquiry procedure if the procedure does not offer a full guarantee of impartiality and does not provide the parties with means to defend their case. The ICRC must also receive an assurance that no public communications on an inquiry request or on the inquiry itself shall be made without its consent.

As a rule, the ICRC shall only take part in the setting up of a commission of inquiry, under the above-stated conditions, if the inquiry is concerned with infringements of the Geneva Conventions or of their 1977 Protocols. It shall on no account participate in the organization of a commission if to do so would hinder or prevent it from carrying out its traditional activities for the victims of armed conflicts, or if there is a risk of jeopardizing its reputation of impartiality and neutrality. ...

4. **Requests to record violations**

If the ICRC is asked to record the result of a violation of international humanitarian law, it shall only do so if it considers that the presence of its delegates will facilitate the discharge of its humanitarian tasks, especially if it is necessary to assess victims' requirements in order to be able to help them. Moreover, the ICRC shall only send a delegation to the scene of the violation if it has received an assurance that its presence will not be used to political ends".

These guidelines do not deal with violations of international law or humanitarian principles to the detriment of detainees whom they have to visit as part of the activities which the ICRC's mandate requires it to carry out in the event of internal disturbances or tensions within a given State. Since this type of activity is based on *ad hoc* agreements with governments, the ICRC follows specific guidelines in such situations.

See also "ICRC Protection and Assistance Activities in Situations not Covered by International Humanitarian Law," *id.*, No. 262, January-February 1988, pp. 9-37.

[12] European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Strasbourg, November 26, 1987, *International Legal Materials*, September 1988, vol. 27, pp. 1152 *et seq.*, entered into force 1 February 1989.

[13] Article 90, paras 1 (*b*) and 2 (*a*).

[14] It should be noted that Protocol I wisely gives no specific role to the ICRC in the creation or operation of the Fact-Finding Commission. Certainly the ICRC could give evidence to the Chamber but it will be disclosed, like all evidence, fully to both sides (Article 90, para. 4 (*b*). If the ICRC were to become involved in fact-finding, it would not be able to fulfil its traditional roles. See note 11 above. Governments could not be expected to allow the ICRC access to POW camps, for example, if the ICRC were at the same time conducting fact-finding enquiries and if, at a later date, ICRC delegates gave evidence to the Chamber without the consent of the government in question.

[15] This procedure follows the example set out in Article 30 of the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, for the election of members of the Human Rights Commission.

[16] 21 December 1965, entered into force 4 January 1969, 660 U.N.T.S. 195, U.S. Sen. Ex. C., 95th Cong. 2d Sess., *International Legal Materials*, March 1966, vol. 5, pp. 352 *et seq.*

[17] Article 90, para. 1 (*c*).

[18] Article 90, para. 1 (*e*).

[19] One commentator suggests the President of the Commission may be appointed by the meeting of the States Parties. M. Bothe, K. J. Partsch & W. A. Solf, *op. cit.*, para. 2.23, p. 546. He also suggests that "as long as rules for the presidency of the Commission have not yet been established, the representative of the depositary takes the chair".

[20] *Cf.* M. Bothe, K. J. Partsch & W. A. Solf, *op. cit.*, para. 2.23, p. 546. Article 90, para. 6 provides that the rules of the Commission "shall ensure that the functions of the President of the Commission are exercised at all times and that, in case of an enquiry, they are exercised by a person who is not a national of the Party to the conflict". Hence the rules will have to provide for the designation of a President *pro tempore* when the elected President cannot exercise his functions on those grounds.

[21] T. M. Franck & H. S. Fairley, "Procedural Due Process in Human Rights Fact-Finding by International Agencies", *American Journal of International Law*, April 1980, pp. 308, 311.

[22] *Id.*, pp. 344-45.

[23] *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, ICRC 1987, para. 3620, p. 1045 (Y. Sandoz, Ch. Swinarski & B. Zimmermann eds.) [hereinafter *ICRC Commentary*].

[24] M. Bothe, K. J. Partsch & W. A. Solf, *op. cit.*, para. 2.15, p. 544.

[25] This common article provides:

"At the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention.

If agreement has not been reached concerning the procedure for the enquiry, the Parties should agree on the choice of an umpire who will decide upon the procedure to be followed.

Once the violation has been established, the Parties to the Conflict shall put an end to it and shall repress it with the least possible delay".

Article 90, para. 2 (*e*) extends this enquiry procedure to any violation of Protocol I. Unfortunately this enquiry procedure cannot be implemented when one Party does not wish the enquiry to take place. Not surprisingly, no enquiry has ever been instituted under this procedure. These defects led to the desire for a more compulsory enquiry procedure. See note 3 above, and *ICRC Commentary*, paras. 3628-29, p. 1047; M. Bothe, K. J. Partsch & W. A. Solf, *op. cit.*, para. 2.16, p. 544, J. Pictet, *The Geneva Conventions of 12 August 1949, Commentary, op. cit.*, 1952, vol. I, pp. 374-79; H. Levie, *The Code of International Armed Conflict*, vol. 2, pp. 878-79.

[26] M. Bothe, K. J. Partsch & W. A. Solf, *op. cit.*, para. 2.14, p. 544. These would include violations of much of the law of naval warfare.

[27] While any violation of the law of armed conflict is a war crime, certain crimes are defined as "grave breaches" by common Article 50/51/130/147 if committed against persons or property protected by the Conventions. They include:

(i) willful killing, torture or inhuman treatment of protected persons;

(ii) willfully causing great suffering or serious injury to body or health of protected persons,

(iii) taking of hostages and extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly;

(iv) unlawful deportation or transfer or unlawful confinement of a protected person;

(v) compelling a prisoner of war or other protected person to serve in the forces of a hostile power; and,

(vi) willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial prescribed in the Geneva Conventions.

[28] Additional Protocol I, Arts. 11, para. 4 and 85, paras 2-4, codify in greater detail the two separate categories of grave breaches. The first category relates to combat activities and medical experimentation and provides for the first time a meaningful standard by which such acts can be judged. A breach within this category requires (1) *willfulness* and (2) that *death or serious injury to body or health be caused* (Art. 85, para. 3).

The Protocol provides that the following acts constitute grave breaches:

(i) making the civilian population or individual civilians the object of attack;

(ii) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause extensive loss of life, injury to civilians and damage to civilian objects, as defined in Article 57, para. 2(a)(iii);

(iii) launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, para. 2(a)(iii);

(iv) making non-defended localities and demilitarized zones the object of attack;

(v) making a person the object of attack in the knowledge that he is hors de combat*;*

(vi) the perfidious use, in violation of Article 37, of the distinctive emblem of the red cross, red crescent, or other protective sign recognized by the Conventions or this Protocol;

(vii) physical mutilations;

(viii) medical or scientific experiments; and,

(ix) removal of tissue or organs for transplantation, except where these acts are justified in conformity with the state of health of the person or consistent with medical practice or conditions provided for in the Conventions.

(1) Exceptions to the prohibition in subparagraph (ix) may be made only in the case of donations of blood for transfusion or of skin for grafting, provided that they are given voluntarily and without any coercion or inducement, and then only for therapeutic purposes, under conditions consistent with generally accepted medical standards and controls designed for the benefit of both the donor and the recipient.

(2) Any willful act or omission which seriously endangers the physical or mental health or integrity of any person who is in the power of a Party other than the one on which he depends and which either violates any of the prohibitions above or fails to comply with these requirements shall be a grave breach of this Protocol.

The second category of grave breaches defined by Protocol I is contained in Article 85, para. 4. The only requirement to be satisfied with respect to these offences is *willfulness*:

(i) The transfer by the occupying power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention.

(ii) Unjustified delay in the repatriation of prisoners of war or civilians.

(iii) Practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination.

(iv) Making the clearly recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53, subpara-

graph (b), and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives.

(v) Depriving a person protected by the Conventions or referred to in paragraph 2 of this article of fair and regular trial.

See also H. Levie, *The Code of International Armed Conflict*, vol. 2, pp. 857-71, and H. S. Burgos, "The Taking of Hostages and International Humanitarian Law", *International Review of the Red Cross*, No. 270, May-June 1989, p. 196.

[29] *ICRC Commentary*, para. 3591, p. 1033.

[30] *ICRC Commentary*, para. 3592, p. 1033. It must be noted that there is no explicit indication of what was meant by this term in Article 89. It replaces "grave breaches" in an article that was to circumscribe reprisals for grave breaches but which was defeated in committee. See H. Levie, *Protection of War Victims*, vol. 4, pp. 333-71. See also *ICRC Commentary*, para. 3621, p. 1045, note 34.

[31] Article 90, para. 2 (*c*) (ii).

[32] *ICRC Commentary*, para. 3625, p. 1046.

[33] *ICRC Commentary*, para. 3624, p. 1046.

[34] *Cf. ICRC Commentary*, para. 3624, p. 1046.

[35] M. Bothe, K. J. Partsch & W. A. Solf, *op. cit.*, para. 2.12, p. 543.

[36] *Ibid.*, para. 2.13, pp. 543-44.

[37] *ICRC Commentary*, para. 3626, pp. 1046-47. The making of such a request would seem to be an appropriate action considering the duty of all States under common Article 1 to ensure respect for the Conventions "in all circumstances".

[38] Article 90, para. 3 (*a*) (i).

[39] *Ibid.*

[40] *ICRC Commentary*, para. 3631, p. 1048 and note 41 (Philippe Bretton).

[41] Article 90, para. 3 (*a*) (ii).

[42] *ICRC Commentary*, para. 3632, p. 1048; M. Bothe, K. J. Partsch & W. A. Solf, *op. cit.*, para. 2.18, p. 545.

[43] In contrast, the members of the Human Rights Commission and the *ad hoc* Conciliation Commission established under the International Covenant on Civil and Political Rights are, under Article 43 thereof, entitled to the "facilities, privileges and immunities of experts on mission for the United Nations" as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations, New York, 13 February 1946, 21 U.S.T. 1418, T.I.A.S. No. 6900, 1 U.N.T.S. 16.

[44] Article 90, para. 3 (*b*).

[45] *ICRC Commentary*, para. 3633, pp. 1048-49.

[46] *Ibid.*

[47] M. Bothe, K. J. Partsch & W. A. Solf, *op. cit.*, para. 2.17, p. 545.

[48] It may be assumed that a special agreement could exclude the right to conduct investigations *in loco*. M. Bothe, K. J. Partsch & W. A. Solf, para. 2.20, p. 545.

[49] *Ibid.*, para. 2.19, p. 545.

[50] Indeed, Article 90, para. 6 provides that the Commission is to establish its own rules, including rules for the presidency of the Commission and the presidency of the Chamber. Article 90, para. 6 does require that the rules provide that the presidency of a Chamber be filled by a person not a national of a Party to the conflict, not just a party to the enquiry.

[51] *E.g.*, Model Rules of Procedure for United Nations Bodies dealing with violations of human rights (UN Doc. E/CN.4/1134, 1 February 1974), Draft Model Rules of Procedure suggested by the Secretary-General of the United Nations for *ad hoc* bodies of the United Nations entrusted with studies of particular situations alleged to reveal a consistent pattern of violation of human rights (UN Doc. E/CN.4/1021/Rev.1), Model rules of procedure of United Nations bodies dealing with violations of human rights

(ECOSOC res. 1870 (LVI)), and the Belgrade Minimal rules of procedure for international human rights fact-finding missions (*American Journal of International Law*, January 1981, vol. 75, pp. 163-65, adopted by the 59th Conference of the International Law Association, Belgrade, 23 August 1980). All of these are reproduced as annexes to *International Law and Fact-Finding in the Field of Human Rights*, The Hague/Boston, Nijhoff, Kluwer, B.G. Ramcharan ed., 1982. Another detailed set of suggested procedural rules may be found in Franck & Fairley, *supra* note 21. See also D. Weissbrodt & J. McCarthy, "Fact-Finding by International Nongovernmental Human Rights Organizations," *Virginia Journal of International Law*, Fall 1981, vol. 22, p. 1.

[52] Article 90, para. 5 (*a*) and (*b*).

[53] Article 90, para. 5 (*a*).

[54] *ICRC Commentary*, para. 3638, p. 1051.

[47] Article 90, para. 1 (*f*).

[56] M. Bothe, K. J. Partsch & W. A. Solf, *op. cit.*, para. 2.11, p. 543.

[57] Article 42, para. 10 of the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, U.S. Sen. Ex. C, 95th Cong. 2d Sess., provides that the UN Secretary-General may advance the expenses of the *ad hoc* Conciliation Commission.

[58] One commentator mentions only voluntary contributions from States party. M. Bothe, K. J. Partsch & W. A. Solf, *op. cit.*, para. 2.24, p. 546. The *ICRC Commentary*, and the original proposals, are silent on this point. *ICRC Commentary*, para. 3641, pp. 1051-52.

[59] Bothe, Partsch & Solf criticize this solution as "highly counter-productive" because it may "prevent a State Party from calling in the Commission". *Id.*, para. 2.25, p. 546.

[60] Article 90, para. 7.

[61] F. Kalshoven, *Constraints on the Waging of War*, ICRC, Geneva, 1987, p. 131.

The International Fact-Finding Commission

THE ICRC'S ROLE

by Françoise Krill

I. INTRODUCTION

To ensure that it is respected, international humanitarian law (IHL) requires mechanisms for its implementation. Most of these are known and have proved their worth, whether as means of prevention, control or repression.[1] They do however have their limitations and, in this sense, the International Fact-Finding Commission provided for in Article 90, Protocol I, fills a gap.

The 1929 Geneva Convention does admittedly contain an enquiry mechanism, which is reproduced in the 1949 Conventions; we shall return to this later. Suffice it to say that the wording of Article 3 common to the four Conventions is so succinct that the proceedings can be paralysed at a procedural level at any time[2] and that it was intended to be invoked only on an *ad hoc* basis. Article 90 represents distinct progress in this respect. The advantage of making it a standard practice to institute an enquiry is that such enquiries are not subject to the prior consent of the Parties concerned. Acceptance of the Commission's competence is given in principle, in peacetime, before there is any need to conduct an enquiry. Moreover, the fact that the Commission is a permanent institution is a considerable deterrent for Parties to a conflict which might be tempted to commit breaches of IHL.[3]

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[1] Sandoz, Yves: "Implementing international humanitarian law", in *The International Dimensions of Humanitarian Law*, Paris, UNESCO, and Pedone, Geneva, Henry Dunant Institute, 1986, pp. 259-326.

[2] *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, eds. Yves Sandoz, Christophe Swinarski, Bruno Zimmermann, ICRC, Martinus Nijhoff Publishers, Geneva, 1987 (hereinafter *Commentary on the Protocols*), Article 90, p. 1047, para. 3629.

[3] *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts,*

We shall first examine the origins of the Commission and dwell on the enquiry mechanism provided for in the Geneva Conventions.[4] We shall then see how the Commission works. The second part of the article will be devoted to the ICRC's role as regards enquiries in general and then within the specific context of Article 90, Protocol I, with particular reference to our relations with the future Commission.

II. THE FACT-FINDING COMMISSION

1. Origins of the Commission

A. Enquiries under the 1929 Geneva Convention

The Commission represents a new and important means of implementing IHL.

As we have seen, the idea of holding an enquiry is not, however, a new one. The 1929 Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field makes provision for a similar mechanism. Article 30 reads as follows:

"On the request of a belligerent, an enquiry shall be instituted, in a manner to be decided between the interested parties, concerning any alleged violation of the Convention; when such violation has been established the belligerents shall put an end to and repress it as promptly as possible".

B. Enquiries under the 1949 Geneva Conventions

At the time, this provision was a major step forward because no mechanism had been provided for in previous Conventions. Nevertheless, in 1934, at the 15th International Conference of the Red Cross, it was pointed out that application of the article would be difficult, as it presupposed agreement between the Parties to the conflict, and that

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Geneva (1974-1977), Federal Political Department, Bern, 1978 (hereinafter *Official Records of the CDDH*), IX, p. 190, para. 4 and p. 191, para. 8. CDDH/I/SR.56.

[4] We have decided not to include the fact-finding procedure's historical development in the present article, but to confine our study to enquiries within the context of the Geneva Conventions. It should be noted, however, that for almost 100 years States have shown an interest in setting up an enquiry procedure: first, Part III of the 1899 Hague Convention was adopted, and was then followed by quite a wide range of established practices and a large number of treaties (see Ben Salah, Tabrizi: *L'enquête internationale dans le règlement des conflits*, Bibliothèque de droit international, ed. Charles Rousseau, vol. LXXIX, Paris, 1976).

some practically automatic procedure ought therefore to be provided.[5] In 1937 a Commission of Experts convened by the ICRC reached certain conclusions which were adopted with practically no amendment by the 16th International Conference of the Red Cross (London, 1938). These conclusions served as a basis for the proposals put forward at the 1949 Diplomatic Conference. The latter did not feel, however, that it could accept, either as a whole or in part, the conclusions reached by the experts consulted by the ICRC.[6] With the exception of the second paragraph, common Articles 52, 53, 132 and 149 accordingly reproduce much the same wording as that to be found in paragraphs 1 and 3 of the 1929 text. They now read:

"At the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention.

"If agreement has not been reached concerning the procedure for the enquiry, the Parties should agree on the choice of an umpire who will decide on the procedure to be followed.

"Once the violation has been established, the Parties to the conflict shall put an end to it and shall repress it with the least possible delay".

The same objections expressed in connection with Article 30 of the 1929 Convention were subsequently made to this provision as well, i.e. that no progress had been achieved in regard to the automatic operation of the procedure of enquiry or the choice of those responsible for carrying it out. That is undoubtedly the greatest obstacle to the implementation of the present Articles.[7]

In actual fact, these Articles common to the Geneva Conventions have never been applied. States have never succeeded in instituting such an enquiry because the opposing Parties did not give their consent.[8]

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[5] *1949 Geneva Conventions*, I, *Commentary*, ed. Jean S. Pictet, ICRC, Geneva, 1952, Article 52, p. 374.

[6] *Ibid*, pp. 375-377.

[7] *Ibid.*, p. 377.

[8] For examples, see J. Pictet, *Humanitarian Law and the Protection of War Victims*, A.W. Sijthoff, Leiden, Henry Dunant Institute, Geneva, 1975, p. 73.

C. Article 90 of Protocol I

- *The 1974-1977 Diplomatic Conference*

From the beginning of the *travaux préparatoires* to the 1974-1977 Diplomatic Conference, the need for some form of verification of compliance with the rules applicable in the event of armed conflict was emphasized by the experts. Two amendments presented during the Conference constitute the main basis for Article 90, Protocol I.[9]

One of the drafts was submitted by the delegations of Denmark, New Zealand, Norway and Sweden, and another by Pakistan.[10] Both drafts contained quite similar proposals, i.e. the establishment of a Permanent Commission vested with the mandatory power to investigate any serious violations of the rules of the law of armed conflicts.[11]

These proposals gave rise to a whole series of counterproposals and amendments. The most serious objections came from a large number of delegations opposed to the Commission's mandatory jurisdiction, its right of initiative and its competence to express an opinion on questions not only of fact but also of law.[12] The text which was finally adopted in plenary represents a compromise between the different tendencies which manifested themselves during the Conference.[13] The ICRC's role is dealt with in detail in section III 2A. below.

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[9] *Commentary on the Protocols*, para. 3602, p. 1040.

[10] *Official Records*, III, pp. 338-339, CDDH/I/241 and *Official Records*, III, pp. 340-342, CDDH/I/267; see also M. Bothe, K.J. Partsch, W.A. Solf, *New Rules for Victims of Armed Conflicts*, Martinus Nijhoff Publishers, The Hague, 1982, para. 2.3, pp. 539-540.

[11] Graefrath, Bernhard: "Die Untersuchungskommission im Ergänzungsprotokoll zu den Genfer Abkommen vom 12.8.1949", *Wissenschaftliche Zeitschrift der Humboldt-Universität* zu Berlin, Ges-Sprachw. R. XXX, 1981, p. 11.

[12] Kussbach, Erich: "Commission internationale d'établissement des faits en droit international humanitaire", *The Military Law and Law of War Review*, Brussels, XX-1/2, 1981, pp. 91-116.

[13] It is interesting to note that an amendment was submitted to plenary by 22 States from the third world allowing for a dispensation to the rule whereby an enquiry could be opened only with the consent of all Parties, i.e. "in case of an occupied territory, the request of the Party whose territory is occupied shall suffice for the institution of the enquiry". This proposal was finally rejected (see *Official Records*, III, p. 344, CDDH/415 of 25 May 1977, and Bretton Philippe: "La mise en œuvre des Protocoles de Genève de 1977", *Revue de droit public et de science politique en France et à l'étranger*, Paris, Vol. 95, No. 2, March-April 1979, pp. 379-423).

- ***The relation between Article 90 and enquiries as provided for by the Geneva Conventions.***

According to the terms of Article 90, para. 2 (e), *"the provisions of Article 52 of the First Convention, Article 53 of the Second Convention, Article 132 of the Third Convention and Article 149 of the Fourth Convention shall continue to apply to any alleged violation of the Conventions and shall extend to any alleged violation of this Protocol".*

Paragraph 2 (e) alludes to three hypothetical situations in which the Commission cannot engage in an enquiry:

— none of the Parties to the conflict has made the declaration provided for in subparagraph (a) of the same paragraph, or

— the defending Party has not given the consent provided for in subparagraph (d), or

— neither of these hypothetical situations exists (there is an *ad hoc* declaration or agreement), but the alleged violations are not serious violations within the meaning of para. (c) (1).

It is precisely when one of the aforesaid situations arises that Articles 52, 53, 132 and 149 common to the Four Conventions should take effect and apply to any violation — serious or not — of the Geneva Conventions and Protocol I.[14]

Nevertheless, if the Parties to the conflict have neither made a declaration nor agreed to an enquiry under Article 90 of Protocol I, it is very unlikely that they will agree on the procedure for an enquiry as provided for in Articles 52, 53, 132 and 149 common to the Four Conventions. On the other hand, the fact that recourse may be had to such a procedure still retains its interest in cases of minor violations of IHL. Parties to the conflict may then opt for a different procedure from the one referred to in Article 90, Protocol I. However, this reservation in favour of the autonomy of the Parties to the conflict does not give them any general authority to alter the procedure before the Commission.[15]

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[14] E. Kussbach, *op. cit.*, pp. 105-106; Ph. Bretton, *op. cit.*, pp. 399-400; M. Bothe, K.J. Partsch, W.A. Solf, *op. cit.*, p. 544, para. 2.16; *Commentary on the Protocols*, p. 1047, paras. 3627-3629.

[15] M. Bothe, K.J. Partsch, W.A. Solf, *op. cit.*, p. 544, para. 2.16.

2. Functioning of the Commission

A. Constitution of the Commission

Article 90 of Protocol I states that the Commission shall be established when not less than twenty States have declared that they agree to accept its competence. Canada was the twentieth[16] State to make this declaration on ratifying the Protocols, and thus the formal conditions for constituting the Commission have been met.

B. Election of members

Switzerland, as the depositary State, has the duty to convene the meeting to be attended by representatives of the said States, who then elect the **fifteen members** of the Commission[17] by secret ballot. Switzerland has sent a note to these twenty States, informing them of certain procedures involved in setting up the Commission and questions that should be considered with regard to its functioning.

These fifteen members must be *"of high moral standing and acknowledged impartiality"*.[18] Those electing them must ensure that each of the persons to be elected to the Commission possesses *"the qualifications required"* and that *"in the Commission as a whole, equitable geographical representation is assured"*.[19] Given the fact that most of the optional declarations of acceptance of the Commissions's competence come from European countries, it will initially be difficult to achieve true geographical representation. It would, however, be wise to encourage electing countries to heed this criterion when submitting candidates — all the more so to promote referral to the Commission on an *ad hoc* basis, within the meaning of Article 90, para. 2 (d) (20).[20]

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[16] The other States which have made this declaration are: Algeria, Austria, Belgium, Byelorussia, Denmark, Finland, Germany, Iceland, Italy, Liechtenstein, Malta, the Netherlands, New Zealand, Norway, Spain, Sweden, Switzerland, Ukraine, Uruguay and the USSR (as at 31 March 1991).

[17] Article 90, para. 1 (a), Protocol I.

[18] Article 90, para. 1 (a), Protocol I. See *Commentary on the Protocols*, paras. 3605-3608, pp. 1041-1042.

[19] Article 90, para. 1 (d), Protocol I. See also M. Bothe, K.J. Partsch and W.A. Solf, *op. cit.*, pp. 542-543: "... the principle of equitable geographical representation should be understood in a broader sense, taking into account, as far as possible, the composition of the High Contracting Parties of the Protocol and not only those which have recognized the competence of the Commission". See also *Commentary on the Protocols*, para. 3614, p. 1043.

[20] *Commentary on the Protocols*, para. 3611, p. 1042.

However, since only States which have made the relevant declaration recognize the Commission's competence in advance, we feel that they cannot, out of a desire for equality, be expected in addition to put forward a candidate from a country which has not made the declaration. Consequently, the greatest possible number of States should be encouraged to make this declaration in order to ensure that the members of the Commission are representative of a broader geographical distribution.

Under the terms of Article 90, no professional qualifications or legal training are required.[21] It is however essential that jurists be present. At the outset, they will be useful advisers in drawing up rules of procedure. Then, they will play an important role in defining the Commission's competence and assessing evidence *(«preuves»)*. [22] To ensure that the Commission can do its work properly people from other professions should also be included in so far as the obligations incumbent upon it relate to the spheres of medicine, chemistry, physics and military science, as well as to international law.[23]

C. Referral to the Commission

It is worth recalling that Article 90, when initially drafted, suggested that the Commission's competence should be obligatory. The final wording of para. 2, Article 90, Protocol I, represents a compromise. A Contracting Party may accept the Commission's competence, either in advance **by declaration**, or on an ***ad hoc*** basis when it is the subject of an enquiry.[24]

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[21] F. Kussbach, *op. cit.*, p. 94.

[22] Some delegates at the Conference expressed the fear that in this way the Commission would come up against some thorny problems regarding its own competence, which could become a source of possible controversy. This is yet another reason why the Commission should include amongst its members highly qualified lawyers. See *Commentary on the Protocols*, para. 3623, p. 1045 and E. Kussbach, *op. cit.*, p. 94.

[23] Circular dated December 1990 from the Swiss Federal Department of Foreign Affairs to States having accepted the competence of the Commission as referred to in Article 90; see also M. Bothe, K.J. Partsch, W.A. Solf, *op. cit.*, p. 542.

[24] *"There is no doubt that only States are competent to submit a request for an enquiry to the Commission, to the exclusion of private individuals, representative bodies acting on behalf of the population, or organizations of any nature. On the other hand, there is no reason why a Protecting Power, duly entrusted in protecting the interests of a Party to the conflict which had recognized the Commission's competence, could not submit a request to the latter in the context of its general mandate. Moreover, it is not necessarily the Party which is the victim of the alleged violation which requests the enquiry. Any Contracting Party in the sense of paragraph 1 (b) can do so, provided that the request applies to another Contracting Party in the sense of*

- ***By declaration***

If the plaintiff accepts the Commission's competence in advance, it may impose an enquiry on any other party that has made the same declaration.[25] Conversely, if either Party has not accepted the Commission's competence, the latter cannot initiate an inquiry. This means that the **declaration** itself establishes and constitutes the obligation to accept the Commission's competence.[26] The clause in Article 90, para. 2 (a), Protocol I, is also referred to as the *"optional clause of obligatory enquiry"*. [27] It should be pointed out that a Party to Protocol I may make such a declaration of recognition at any time.

- ***On an* ad hoc *basis***

Non-acceptance of the Commission's competence is not necessarily final. A State which has not made the optional declaration may change its mind and later accept the Commission's competence to enquire into a specific situation;[28] this alternative is provided for in Article 90, para. 2 (d). This means that any Party to an international armed conflict, even if it is not a Party to the Protocol,[29] may approach the Commission regarding an allegation of a grave breach or serious violation of the Conventions.[30]

National liberation movements may also have recourse to this simplified procedure.[31] Protocol I, Article 96, para. 3 (a), stipulates that, on receipt of the declaration of intent, *"the Conventions and this Protocol are brought into force with immediate effect"*. Assuming that the opposite were the case — a liberation movement could not make an *ad hoc* declaration under Article 90 — part of the content of Article 96 would lose its meaning and it would be necessary to

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the same provision. As regards the Commission, it is absolutely not permitted to act on its own initiative". See *Commentary on the Protocols*, para. 3618, p. 1044; see also E. Kussbach, *op. cit.*, p. 101, who confirms that the Commission may not act on its own initiative.

[25] See Article 90, para. 2 (a), Protocol I.

[26] See E. Kussbach, *op. cit.*, p. 99.

[27] See Ph. Bretton, *op. cit.*, p. 398: *"le Protocole contient une clause que l'on pourrait appeler 'clause facultative d'enquête obligatoire' dans la mesure où elle ressemble beaucoup à l'article 26, paragraph 2 du Statut de la Cour Internationale de Justice, qui a créé la clause facultative de juridiction obligatoire de la Cour"*.

[28] See E. Kussbach, *op. cit.*, p. 99.

[29] Andries, André, *Fonctionnement de la Commission internationale d'établissement des faits*, Commission interdépartementale belge de droit humanitaire, 1990, 12 pp.

[30] *Commentary on the Protocols*, para. 3626, p. 1046.

[31] *Ibid*; see also E. Kussbach, *op. cit.*, p. 100.

examine on a case-by-case basis which provisions in Protocol I the aforesaid movement must respect.

Clearly, in all the above-mentioned cases, the consent (by means of an ***ad hoc* agreement**) of the challenged Party is always necessary even if the latter has made a declaration in advance recognizing the Commission's competence. Indeed, were consent to be a foregone conclusion, it would introduce an element of disparity: a Party to a conflict which has not recognized the Commission's mandatory competence could oblige another Party to the conflict which *has* recognized this competence to accept an enquiry, but without having to accept an enquiry itself.[32]

D. Extent of the Commission's competence

Protocol I[33] lays down two distinct duties.

- ***Enquiry***

The Commission's task is to *"enquire into any facts alleged to be a grave breach as defined in the Conventions and this Protocol or other serious violation of the Conventions or of this Protocol"* (para. 2 (c) (i)).

The Commission is competent to enquire into the **facts** and not to decide matters of law or pass judgment.[34] However, it must be admitted that, in order to determine the extent of their mandate, the members of the Commission must make a preliminary assessment of the admissibility of the request, hence the importance for the Commission to include highly qualified legal experts amongst its members (see section 2 B above). It should be recalled that any allegation brought before the Commission must relate to a *"grave breach"* or *"serious violation"* of the Conventions and the Protocol. It obviously follows that breaches and violations which are not serious are excluded,[35] although these violations may become serious if they are repeated.[36] Above all, it would be difficult to distinguish between grave breaches and serious violations in that this distinction scarcely appears in the

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[32] *Ibid.*

[33] Protocol I, Article 90, para. (c).

[34] *Commentary on the Protocols*, para. 3620, p. 1045.

[35] "Its competence does not extend to all violations as in common Articles 52/53/132/149." See M. Bothe, K.J. Partsch, W.A. Solf, *op. cit.*, p. 544.

[36] *Commentary on the Protocols*, para. 3621, p. 1045.

text of the Conventions and the Protocol, which always refer to "grave breaches".[37]

- ***Good offices***

The Commission is also competent to *"facilitate, through its **good offices**, the restoration of an attitude of respect for the Conventions and the Protocol..."* (Para. 2 (c) (ii)).

Clearly, the members of the Commission would be quite unable to accomplish this task without assessing the facts in terms of the law. Nevertheless, when the Commission submits, as laid down in Article 90, para. 5, *"such recommendations as it may deem appropriate"*, it must avoid including in its report any comments or judgment on the relevant law and must adhere solely to the facts.[38] The term "good offices" can be understood to mean the communication of conclusions on the possibilities of a peaceful settlement, and written and oral observations by States concerned.[39]

E. Role of the Chamber of Enquiry

- ***Constitution of the Chamber***[40]

According to Article 90, para. 3, all enquiries shall be undertaken by a Chamber consisting of five members appointed by the President of the Commission and two *ad hoc* members appointed by the Parties to the conflict.

The Chamber is set up only upon receipt of a request for an enquiry.

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[37] We shall mention however Article 89, Protocol I, which does use the term "serious violations", and the Commentary on this Article which defines this term in relation to that of "serious breaches". See *Commentary on the Protocols*, paras. 3591-3592, p. 1033; E. Kussbach uses responsibility as the basis for distinction: "breaches as defined by the Conventions and the Protocol invoke — either directly (war crime) or under internal law *(delictum juris gentium)* — the personal responsibility of the individual who committed the international crime. On the other hand, violations involve the responsibility of a Party to the conflict which has violated a rule of international law".

[38] M. Bothe, K.J. Partsch, W.A. Solf, *op. cit.*, p. 544.

[39] *Commentary on the Protocols*, para. 3625, p. 1046.

[40] For more details on the constitution of the Chamber, please see:
— *Commentary on the Protocols*, paras. 3630-3633, p. 1048.
— M. Bothe, K.J. Partsch, W.A. Solf, *op. cit.*, p. 545.
— E. Kussbach, *op. cit.*, pp. 102-103.
— Ph. Bretton, *op. cit.*, pp. 401-402.

- ***Conduct of the enquiry***

In accordance with Article 90, para. 4, after being set up the Chamber will invite the Parties to the conflict to assist it in seeking and presenting evidence. Furthermore, the Chamber itself may seek such other evidence as it deems appropriate. It may also carry out an investigation *in loco.*

Obviously, Article 90 states only the general principles for the enquiry procedures. Under para. 6 it is up to the Commission to establish its own rules of procedure, which will then have to specify whether the responsibility for drawing up the rules governing the conduct of an enquiry rests with the Commission itself, or whether this task devolves upon the Chamber, which adopts its own rules of procedure. We share the opinion of Mr. Roach, who prefers the first alternative.[41] As regards the content of the rules themselves, standard procedures have been established for this purpose for the organs of the United Nations which have to deal with violations of human rights.[42]

One issue remains unresolved: the compatibility between the provisions of the above-mentioned rules of procedure and the national legislation of member States of the Commission. The Interdepartmental Commission on Humanitarian Law in Belgium has already studied this aspect of the problem and believes that on several points modifications would be necessary.[43]

- ***Report***

Under Article 90, para. 5, the Commission submits a report on the findings of fact of the Chamber, and may add recommendations. The Commission will not report its findings publicly, unless all the Parties to the conflict have requested the Commission to do so.

F. The Commission's expenses

In accordance with Article 90, para. 7, the **administrative expenses** will be met by mandatory contributions from the Contracting

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[41] Ashley Roach: "The International Fact-Finding Commission - Article 90 of Protocol I additional to the 1949 Geneva Conventions", p. 179 above: "I suggest the former is preferable, because of the urgency of getting on with each Chamber's work".

[42] We shall not expand on this because Mr. Roach mentions it in his article. See also *Commentary on the Protocols*, para. 3634, p. 1049. We should nevertheless like to add that, during the CDDH, Denmark proposed inviting international, governmental and non-governmental organizations together with private individuals to supply evidence. Although Article 90 does not contain this proposal, it is not opposed to it either (See B. Graefrath, *op. cit.*, p. 14).

[43] See A. Andries, *op. cit.*, pp. 7-8.

Parties which made the optional declaration accepting the mandatory competence of the Commission, and by voluntary contributions.

The **expenses incurred by a Chamber** are divided between the Party to the conflict which asked for the enquiry and the defendant Party.[44]

Switzerland will provide the Commission with the administrative facilities for the performance of its functions.[45]

III. THE ICRC's ROLE

1. The enquiry

Some proposals put forward in this respect at the 1949 Diplomatic Conference were rejected (see section II 1 B above), notably a text submitted by the ICRC to the 17th International Conference of the Red Cross (Stockholm, 1948), on the basis of the conclusions reached by government experts. Paragraph 3 of its Article 41 "Enquiry procedure" gave the ICRC a role in appointing members of the Commission of enquiry:

"The plaintiff and defendant States shall each appoint one member of the Commission. The third member shall be designated by the other two and, should they disagree, by the President of the Court of International Justice or, should the latter be a national of a belligerent State, ***by the President of the International Committee of the Red Cross.***"[46]

Articles 52, 53, 132 and 149 common to the four 1949 Geneva Conventions which were finally adopted make no provision for any intervention by the ICRC. Nevertheless, it has been called upon a number of times to initiate enquiries: in 1936, for instance, when various incidents occurred in the course of the conflict opposing Italy and Ethiopia; in 1943 for the Katyn affair, and in 1953, when a request was submitted for an enquiry into the alleged use of bacte-

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[44] See E. Kussbach, *op. cit.*, p. 105.

[45] Article 90, para. 1 (f).

[46] *Commentary on the First Geneva Convention*, Article 52, p. 376.

riological weapons.[47] Over the years the ICRC has decided on the attitude it intends to adopt in this respect and it has made it known.[48]

2. Background to Article 90 of Protocol I

A. The 1974-1977 Diplomatic Conference

- ***Initial proposals***

At the beginning of the Conference, Pakistan proposed an Article 7 bis conferring a key role on the ICRC to open and conduct an enquiry[49] as well as an Article 7 ter entitled "Settlement of disagreements" which also mentioned the ICRC.[50] These two amendments were withdrawn at the final session of the Conference. During the second session of the Conference in 1976, Denmark, New Zealand, Norway and Sweden added a new Article 79 bis, the first and sixth paragraphs of which proposed entrusting to the ICRC the task of administrator of a Permanent International Enquiry Commission.[51] A few days later Pakistan made a counterproposal entrusting this role to

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[47] See "Action taken by the ICRC in the event of breaches of international humanitarian law", in *IRRC*, No. 221, March-April 1981, p. 80.

[48] ICRC guidelines in the event of breaches of international humanitarian law are reproduced *in extenso* in Mr. Roach's article *op. cit.*, pp. 183-185.

[49] *Official Records*, III, p. 42, CDDH/I/27, 11 March 1974; paras. 1 and 2 of the new Article 7 bis were worded as follows:

"1. ... or the International Committee of the Red Cross shall institute an enquiry concerning any alleged violation of the Conventions or this Protocol...

"2. ... or the International Committee of the Red Cross to carry out an independent enquiry. The Protecting Power or the International Committee of the Red Cross shall carry out the enquiry in accordance with paragraph 1 of this Article."

[50] *Official Records*, III, p. 43, CDDH/I/25, 11 March 1974; Article 7 ter, para. 2 was worded as follows:

"2. ...or delegated by the International Committee of the Red Cross, who shall be invited to participate in such a meeting".

[51] *Official Records*, III, p. 338, CDDH/I/241 and Add. 1, 19 March 1975; paras. 1 and 6, Article 79 bis, were worded as follows:

"1. ... The International Committee of the Red Cross shall draw up the procedures for appointment, as well as other rules relating to membership, including the Presidency of the Commission, and shall undertake the appointments but shall in no way be responsible for the enquiries undertaken or the findings which emerge from them.

"6. ... The Commission's activities shall be financed by voluntary contributions channelled by the International Committee of the Red Cross".

the depositary.[52] None of the subsequent amendments made reference to the ICRC's role in this respect.[53]

- ***The discussions***

The discussions on Article 79 bis took place during the third session of the Diplomatic Conference.[54]

Denmark, on behalf of three other delegations (New Zealand, Norway and Sweden), Pakistan and Japan submitted various amendments to Article 79 bis. Whilst the first four countries did not envisage any obstacles to the ICRC's role — specifying that "none of the provisions should in any way affect the traditional impartiality of the ICRC or its humanitarian activities",[55] Pakistan wanted "to avoid involving the ICRC in inevitable disputes".[56] The ICRC stated its willingness to accept the proposed administrative duties while making it clear that "what was of paramount importance was that the nature of that function — which must remain distinct from the other tasks undertaken by the ICRC — was open to no ambiguity. There must be no possibility of confusion between its role as administrator of the international enquiry commission and the traditional duties of protection and assistance conferred upon it by the Geneva Conventions and Protocol I".[57] The ICRC considered it essential that its "nomination as administrator of the Commission should not arouse controversy...".[58]

During the ensuing discussions, most of the delegations[59] expressed reservations in the sense that *"the ICRC must not be placed in a situation that would be incompatible with its traditional role, its right of initiative and its neutrality..."*[60]

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[52] *Official Records*, III, p. 340, CDDH/I/267, 25 March 1975.

[53] *Official Records*, III, p. 342, CDDH/I/316, 10 May 1976; *Official Records*, III, p. 343, CDDH/415 and Corr. 1 and CDDH/415/Add. 1 and 2, 25 May 1977; *Official Records*, III, p. 344, CDDH/416, 25 May 1977; *Official Records*, III, p. 345, CDDH/420, 26 May 1977.

[54] From 12 to 14 May 1976.

[55] *Official Records*, IX, p. 190, para. 7, CDDH/I/SR.56.

[56] *Official Records*, IX, p. 193, para. 17, CDDH/I/SR.56.

[57] *Official Records*, IX, p. 195, para. 25, CDDH/I/SR.56.

[58] *Official Records*, IX, p. 195, para. 26, CDDH/I/SR.56.

[59] *Official Records*, IX, p. 207, para. 3, p. 210, para. 17 and p. 211, para. 28, CDDH/I/SR.57; *Official Records*, IX, p. 223, para. 4, p. 224, para. 8, p. 227, para. 20 and p. 227, para. 25, CDDH/I/SR.58.

[60] *Official Records*, IX, p. 210, para. 17, CDDH/I/SR.57.

Article 90, as finally adopted by the Conference, does not confer any role on the ICRC. This was a wise decision.

B. Relations with the future International Fact-Finding Commission

Article 90, Protocol I, makes no mention of any connection between the ICRC and the future Commission. Be that as it may, the discussions during the 1974-1977 Diplomatic Conference show that States wished to make a clear distinction between the ICRC and the Commission, both as institutions and in terms of their respective mandates. Consequently, even if States were to express the desire for the ICRC to give its opinion on the nomination of members of the Commission, we consider that it would not be advisable for it to do so. We also feel that it would be equally inappropriate for the ICRC to take part in meetings of the Commission as an observer. Indeed, when the idea was mooted that nomination of the members of the Commission should be entrusted to the ICRC, it clearly responded that "... *the ICRC would not itself take part in the activities of the Commission*".[61]

That does not mean, however, that there should be no relationship between the Commission and the ICRC. The XVth Round Table, organized in September 1990 by the San Remo International Institute of Humanitarian Law, put forward several recommendations in this connection.[62] This is the spirit that should prevail during consultations between the Commission and the ICRC.

IV. CONCLUSION

It is interesting to note that an enquiry procedure was proposed by the ICRC as early as 1937, in the course of its efforts to improve and strengthen Article 30 of the 1929 Convention. Regrettably, its recommendations went unheeded (see section II 1 B).

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[61] *Official Records*, IX, p. 232, para. 47, CDDH/I/SR.58.

[62] "... consultations on the respective working methods of the ICRC and the Commission would make it possible to define their respective approaches more clearly and to guarantee the necessary complementarity. It was therefore vital that the Commission, once set up, contact the ICRC". See XVth "Round Table of the International Institute of Humanitarian Law" (San Remo, 4-8 September 1990), *IRRC*, No. 280, January-February 1991, p. 62.

More than half a century was to pass before a Commission, which is indisputably an important means of developing and consolidating an enquiry mechanism, finally came into being.

Establishment of the Commission provided for in Article 90 of Protocol I also has further advantages. In the past, several requests for enquiries have been presented to the ICRC; it has thus frequently found itself in an awkward position because it never sets itself up as a commission of enquiry.[63] Henceforth, the ICRC can invite the plaintiff Party to contact the Commission which, by drawing up a confidential report, will incidentally be complying with the conditions the ICRC had set for itself in the event of a request for an enquiry.[64] Lastly we believe that this is an excellent means of implementing the obligation "to ensure respect" laid down in Article 1 common to the Four Geneva Conventions.[65]

Beyond all doubt, the Commission constitutes an additional means of strengthening the implementation of, and respect for, international humanitarian law. Although it is complementary to the ICRC it is distinct from it; this should enable the ICRC to continue its traditional tasks while retaining its reputation for impartiality and neutrality.

Françoise Krill

Françoise Krill is a graduate of the Law Faculty of Neuchâtel (Switzerland) and a qualified barrister. She was an ICRC delegate in Chad and Lebanon from 1978 to 1980, then joined the Swiss Federal Department of Foreign Affairs from 1981 to 1984. During her service there she was attached to the Swiss Embassy in Nairobi from 1982 to 1983. She has been a member of the ICRC's Legal Division since 1984. She has published several articles in the *IRRC*, in particular: "ICRC action in aid of refugees" (*IRRC*, No. 265, July-August 1988, pp. 328-350).

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[63] See "Guidelines in the event of breaches of international humanitarian law", *IRRC*, No. 221, March-April 1981, p. 83.

[64] *Ibid.*

[65] *Official Records*, IX, p. 192, para. 16, CDDH/I/SR. 56.

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The International Fact-Finding Commission

STEPS TAKEN BY THE DEPOSITARY STATE

On 20 November 1990, the twentieth State made a declaration recognizing *ipso facto* and without special agreement, in relation to any other participating State accepting the same obligation, the competence of an International Fact-Finding Commission whose task it will be to investigate allegations by any such State. Article 90 of Protocol I additional to the Geneva Conventions of 1949 provides for the setting up of the Commission once 20 States have recognized its competence. The Commission will be competent to enquire into any facts alleged to be a grave breach as defined in the Conventions and Protocol I or other serious violation of those instruments and to facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and the Protocol.

The conditions for the constitution of the Commission have thus been met and Switzerland, as the depositary State for the Geneva Conventions, sent out a diplomatic note at the end of December 1990 convening a meeting of representatives of the States that had made the declaration in order to elect the 15 members of the Commission by secret ballot. The members of the Commission will serve in their personal capacity and hold office until the election of new members at the ensuing meeting of States having made the declaration. Such meetings will be convened by the depositary State once every five years.

The first meeting will be held in Bern in the second half of June 1991 (the exact date has not yet been set). Switzerland has asked each State concerned to nominate one candidate for the Commission and to submit his or her name and professional qualifications by 30 April 1991.

The candidate proposed by a State need not necessarily be a citizen of that State, especially as equitable geographical representation must be assured in the Commission as a whole.

The candidate must be of high moral standing and acknowledged impartiality and must have the necessary qualifications. Switzerland feels that the Commission will function more satisfactorily if its members come from a number of different professional backgrounds. The Commission will be dealing with matters involving medicine, chemistry, physics, military science and international law.

The Swiss Government will send the States concerned a list of the candidates with a profile of each in early May.

Following the election of the Commission's members, Switzerland will provide it with all the assistance necessary for it to meet and establish its rules of procedure.

PROTOCOL OF 8 JUNE 1977 ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS (PROTOCOL I)

List of States (21) having declared that they recognize the competence of the International Fact-Finding Commission, under Article 90, para. 2a) of Additional Protocol I

(as at 31 March 1991)

STATES	DATE OF NOTIFICATION
Sweden	31 August 1979
Finland	7 August 1980
Norway	14 December 1981
Switzerland	17 February 1982
Denmark	17 June 1982
Austria	13 August 1982
Italy	27 February 1986
Belgium	27 March 1987
Iceland	10 April 1987
The Netherlands	26 June 1987
New Zealand	8 February 1988
Malta	17 April 1989
Spain	21 April 1989
Liechtenstein	10 August 1989
Algeria	16 August 1989
USSR	29 September 1989
Byelorussia	23 October 1989
Ukraine	25 January 1990
Uruguay	17 July 1990
Canada	20 November 1990
Germany	14 February 1991

HUMANITARIAN POLICY AND OPERATIONAL ACTIVITIES

The ICRC's responsibilities in connection with the Middle East conflict

by Yves Sandoz

In its January-February 1991 issue, the *Review* informed its readers of the successive representations made by the ICRC from the outbreak of the Middle East conflict both to the States party to the conflict and to the other States to remind them of their obligations under the Geneva Conventions. In particular, the ICRC sent a *note verbale* on 14 December 1990 to the 164 States party to the Conventions, together with a *Memorandum on the applicability of international humanitarian law*, and launched appeals to the belligerent States on 17 January and 1 and 24 February 1991.

These messages, which reflected the evolving nature of the conflict, were intended not only to remind the States of their duties and obligations under international humanitarian law (IHL), but also — in particular the appeal of 1 February — to bring about a better understanding of the ICRC's various responsibilities in its capacity as a neutral, impartial and independent humanitarian institution and pursuant to its mandate to promote and ensure respect for IHL.

It would be useful now to take a closer look at these responsibilities and various aspects thereof.

The ICRC's responsibilities, on the basis of which it takes action and makes its opinion known, can be divided into three main categories:

— as a moral authority;

— its operational activities in situations of armed conflict;

— as an expert on IHL.

1. The ICRC's moral authority

Through its activities the ICRC has undeniably acquired a certain moral authority. Some people think that it should make greater use of this authority, in particular by acting as a mediator or taking positions on various international issues, such as it did, for example, by voicing concern about the use of atomic weapons in Hiroshima and Nagasaki.

This moral authority has enabled the ICRC, together with the International Red Cross and Red Crescent Movement as a whole, actively to promote peace and draw attention to the horrors of war. The fact that armed conflict leaves a trail of devastation even where IHL is applied has frequently been pointed out by the Movement. The ICRC in particular has denounced, for example in its appeal of 1 February, the intolerable suffering brought about by war, and will continue to do so. Its responsibility in this respect has also led it to deplore the international community's failure to achieve peaceful solutions. Indeed, whether or not IHL is respected, war always implies such a failure, as recognized by the UN in the present context.

It should clearly be established, however, that to deplore the use of force is not tantamount to *condemning* recourse to it on this occasion. Neither the ICRC nor the Movement as a whole are pacifist in the strict sense of being opposed to all forms of armed violence. Would it have been preferable not to use force against Kuwait's occupiers? Could that force have been used differently? Was force absolutely necessary to free Kuwait? These are questions on which the ICRC, by virtue of its principle of neutrality and, concomitantly, to preserve its ability to act as a neutral institution and intermediary, need not and moreover *must not* take a position. Bitterness at the outbreak of war should not be construed as an automatic condemnation of the belligerents.

The main concern put forward by the ICRC in its appeal of 1 February, namely that "the law of war [...] might be swept aside", stems from moral rather than legal considerations. It was prompted by the perceptible tendency in certain statements to "barter" with that law and, above all, by the fear of an escalation of the means and methods of warfare used, in particular by recourse to chemical or nuclear weapons.

In speaking of a potential "tragedy even greater than the use of force" were the law of war to be swept aside and such means used, the ICRC again took an implicitly moral stand. Its concern focused on the untold devastation that such an escalation would wreak upon the civilian population and the environment, the deep rift it would almost

inevitably create between the Arab world and the western countries and the resultant barrier of incomprehension that would bar the way to negotiated solutions to the region's problems.

It is important also to remember that respect for IHL, in addition to its immediate importance for conflict victims, is a key factor in paving the way for the reconciliation of the belligerent parties. The role of the International Red Cross and Red Crescent Movement, in particular that of the ICRC, in ensuring respect for IHL is therefore considered by the Movement as one of its major contributions to peace.[1]

2. The ICRC's operational activities in situations of armed conflict

Although the ICRC did not make an explicit offer of services in its appeal of 1 February, by calling for respect for IHL it nevertheless implicitly asked to be allowed to carry out its mandate under that law.

As already mentioned, the appeal did not denounce any violations of humanitarian law. This is in keeping with the fact that the role adopted by the ICRC in the field of IHL is that of an expert rather than a court.

The ICRC's activities in situations of armed conflict are of course governed by IHL, which lays down its specific duties and recognized right of initiative. However the institution's *objective* is not primarily of a legal nature. Its primary aim is not to stand in judgment, but to ensure the best possible application of IHL.

In principle therefore the ICRC does not publicly denounce breaches of IHL unless two conditions are met, namely that those breaches have been ascertained by the ICRC itself and that its representations to the parties to the conflict have been of no avail.[2] In short, its objective first and foremost is to alleviate the suffering of victims in tangible ways and preserve its operational capacity, not to keep a systematic public record on respect for IHL. It does not and in no way aspires to act as a court.

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[1] See the "Message to the World Community: Through Humanity to Peace" issued by the Second World Red Cross and Red Crescent Conference on Peace (Aaland/Stockholm, 2-7 September 1984) in *IRRC*, No. 243, November-December 1984, pp. 335-338.

[2] See "Action by the ICRC in the event of breaches of international humanitarian law", *IRRC*, No. 221, March-April 1981, pp. 76-83.

3. The ICRC as an expert on international humanitarian law

The ICRC drafts IHL, ensures its promotion, explains it in its *Commentaries* on the Geneva Conventions and Protocols, helps to disseminate it and paves the way for its development. Acknowledgement of the ICRC's very extensive role in this connection is based on the confidence placed in the ICRC's expertise in this field. Any mention of IHL by the ICRC is thus endorsed by its own credibility.

The ICRC undoubtedly has a responsibility, in its capacity as an expert on the subject, to answer any questions it is asked about IHL. It thus recently provided detailed explanations on various legal aspects of the Middle East conflict.[3] However the role of expert that it has agreed to play must not be confused with the positions it adopts in specific situations. Thus to proclaim that torturing prisoners is prohibited is not tantamount to inferring that prisoners actually have been tortured in a specific instance.

Yves Sandoz
ICRC Director of
Principles, Law and
Relations with the Movement

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[3] See *IRRC*, No. 280, January-February 1991, pp. 28-30.

ICRC appoints two new members

At its latest meeting on 13 and 14 March 1991, the Assembly of the International Committee of the Red Cross appointed two new members, Dr. Rodolphe de Haller and Mr. Daniel Thurer. Their appointment brings membership of the Committee, which is composed exclusively of Swiss citizens, to 21.

- **Rodolphe de Haller,** M.D., was born in 1932 and is originally from Bern. He now lives in Jussy in the canton of Geneva. He studied in Neuchâtel, Lausanne and Vienna. His career as a pneumology specialist took him to St-Loup (canton of Vaud), Davos, Lausanne, Geneva and London. Dr. de Haller, who currently lectures at the Faculty of Medicine of the University of Geneva, is the author of numerous scientific publications on tuberculosis and other pulmonary diseases.

- **Daniel Thurer,** LL.D., is a professor at the University of Zurich. He was born in 1945 and is originally from Chur and Valzeina (canton of Graubünden). He studied in Zurich, St-Gallen and Cambridge and later lectured at the Universities of Zurich and Heidelberg and at Harvard Law School in Boston. In 1983, he was appointed assistant lecturer in public international law, constitutional law and administrative law at Zurich University. In 1985, he became professor extraordinary and in 1989 was appointed full professor at the University's Faculty of Law.

In December of last year, the Committee conferred honorary membership upon three of its former members, Mrs. Denise Bindschedler, Dr. Athos Gallino and Dr. Alain Rossier.

The missions which took ICRC President Cornelio Sommaruga to Great Britain, France, Jordan and the United States in February and early March 1991 were part of the effort to mobilize humanitarian aid to meet the immediate needs of the victims of the Middle East conflict and its aftermath.

During the same period the President also carried out official visits in Switzerland, Italy and Brazil.

Great Britain (5-8 February)

On 5 February 1991 President Sommaruga travelled to London at the invitation of the British Government. He was accompanied by Mr. Michel Convers, head of the Operational Support Department, Mr. Paul Grossrieder, Deputy Director of Operations, and Mr. Hans-Peter Gasser, Legal Adviser to the ICRC.

The Middle East conflict and its repercussions in humanitarian terms were the central theme of talks between the ICRC delegation and the British Prime Minister, Mr. John Major, the Minister of Defence, Mr. Tom King, and the Foreign Minister, Mr. Douglas Hurd. Among matters discussed was the plight of British and Allied prisoners of war in Iraqi hands, and of Iraqi prisoners in Allied hands. The ICRC's operations in Africa were the subject of an exchange of views with the Minister for Overseas Development, Mrs. Lynda Chalker.

The financing of the ICRC's headquarters and field budgets was also discussed. The Foreign Minister announced that a special contribution of £ 2,500,000 would be made to the ICRC for the work of the International Red Cross and Red Crescent Movement in the Middle East.

While in London, the ICRC President visited the headquarters of the British Red Cross, which had prepared a three-part programme for the occasion. First was a symposium on international humanitarian law

for members of the legal and medical professions, at which the ICRC representatives and members of the British Red Cross spoke. Then there was a presentation of the activities of the British Red Cross, especially its London Committee. Finally, several working sessions were held with Lady Limerick, Chairman of the British Red Cross, and leading staff members on questions of common interest, including the forthcoming International Conference of the Red Cross and Red Crescent.

On 6 February, the ICRC President was invited by the Royal Institute of International Affairs to give a lecture entitled "Humanitarian conscience in international relations: the mandate and action of the ICRC". Mr Sommaruga also took part in television and radio broadcasts and gave a press conference for about forty journalists of the British and foreign press.

France (13 and 14 February)

Accompanied by Mr. Michel Convers and by Mr. François Bugnion, Deputy Director of the Department of Principles, Law and Relations with the Movement, the ICRC President was received on 13 February by the President of the Republic, Mr. François Mitterrand, the Prime Minister, Mr. Michel Rocard, the Minister-Delegate to the Ministry of Foreign Affairs, Mrs. Edwige Avice, the Secretary of State attached to the Ministry of Defence, Mr. Gérard Renon, and the Secretary of State for Humanitarian Affairs, Mr. Bernard Kouchner.

All those who took part in the talks, which focused on the humanitarian implications of the Middle East conflict, expressed their concern for the plight of civilians and stressed the necessity for strict compliance with international humanitarian law in that respect. The French government representatives were particularly interested in the ICRC's plans and initial operations to bring assistance to civilians.

The discussions also covered prisoners of war, the dissemination of international humanitarian law, and the question of France's ratification of Additional Protocol I. The French contribution to the ICRC budgets was also examined.

The ICRC President was received at the headquarters of the French Red Cross by its President, Mrs. Georgina Dufoix, who had also accompanied him in his visits to the French authorities. Talks between them mainly concerned the forthcoming International Conference of the Red Cross and Red Crescent.

Mr. Sommaruga gave a press conference attended by about fifty journalists, and spoke on television.

Jordan (16 and 17 February)

On 16 February Mr. Sommaruga, accompanied by Mr. François Bugnion, arrived in Jordan in order to examine with the Jordanian authorities the humanitarian problems arising from the conflict in the Middle East.

The ICRC delegation, including Mr. Werner Kaspar, head of the ICRC delegation in Amman, was received by H.R.H. Crown Prince Hassan, H.M. Queen Nour, H.R.H. Princess Sarwath, Mr. Salam Hammad, Deputy Minister of the Interior, and Dr. Ahmad Abu-Goura, President of the Jordanian Red Crescent. The delegation also had talks with Mr. Yasser Arafat, Chairman of the Palestine Liberation Organization, and Mr. Al-Weis, the Iraqi Ambassador.

All those present at the discussions showed great concern for the plight of civilians and agreed that means must be sought to improve their situation. It was recommended that the parties to the conflict establish health and safety zones and centres and conclude agreements for their recognition. Mention was also made of possible agreements relating to the protection of hospitals. It was likewise emphasized that the parties should respect sites of religious significance.

The condition of prisoners of war in the hands of the various belligerents was discussed. Prince Hassan stated that his country, as a neutral power, was willing to receive sick and wounded prisoners of both sides, in accordance with Articles 109 to 117 of the Third Geneva Convention.

The ICRC promised to offer its good offices to the parties in this respect.

At the end of his mission, the ICRC President gave a press conference for more than 100 journalists from the Jordanian press and from international organizations.

Switzerland (25 February)

Visiting Bern on 25 February, President Sommaruga was received by the President of the Swiss Confederation and head of the Federal Department of the Interior, Mr. Flavio Cotti, the head of the Federal Department of Foreign Affairs, Mr. René Felber, and the head of the

Federal Military Department, Mr. Kaspar Villiger. Mr. Sommaruga was accompanied by Mr. Claudio Caratsch, Vice-President, Mr. Guy Deluz, Director-General, Mr. Jean de Courten, Director of Operations, and Mr. Yves Sandoz, Director for Principles, Law and Relations with the Movement. Mr. Michel Convers, Mr. Jean-Claude Hefti and Mr. Jürg Bischoff were also present.

The ICRC representatives held a working session with a delegation from the Federal Department of Foreign Affairs, chaired by H.E. Ambassador Jean-Pierre Keusch, Director of the Division for International Organizations.

The discussions between the ICRC and the Swiss authorities centred on the humanitarian problems arising from the Middle East conflict, and from other conflicts such as those in Cambodia, Sri Lanka and Afghanistan. They also covered the financing of ICRC activities and the forthcoming International Conference of the Red Cross and Red Crescent. In the field of humanitarian law, the participants discussed the setting-up of the International Fact-Finding Commission, as provided for in Article 90 of Protocol I, and ways to ensure that new weapons conformed with international humanitarian law.

The President of the ICRC gave a press conference for some forty journalists accredited to Bern, and delivered a lecture entitled "Diplomatie als Mittel zum humanitären Eingreifen: die Aktion des IKRK heute" to the Swiss Association for Foreign Policy.

Italy (26 and 27 February)

At the invitation of the *Italian Society for International Organization*, the ICRC President visited Rome on 26 and 27 February. He was accompanied by Mr. Francis Amar, Deputy Delegate General for Europe and North America.

In talks with leading officials of the Italian Red Cross on 26 February, Mr. Sommaruga gave an extensive overview of the activities undertaken by the Movement and especially by the ICRC in connection with the Middle East conflict and in other troubled areas of the world. Among the subjects raised were the statutes of the Italian Red Cross, and the provision of personnel for ICRC operations.

In the evening of the same day, the ICRC President gave a lecture in Italian to the *Italian Society for International Organization*, entitled "Humanitarian diplomacy: a field of endeavour for the ICRC". The large audience included foreign diplomats, representatives of the

Ministry of Foreign Affairs, leading members of academic circles, high-ranking military officers and journalists.

During his stay in Rome, Mr. Sommaruga had talks with several members of the Italian government: Mr. V. Rognoni, Minister of Defence, Mrs Susanna Agnelli, Under-Secretary of State at the Ministry of Foreign Affairs, and Mr. Guilio Andreotti, President of the Council of Ministers. The main topics discussed were the Movement's activities in the Middle East, the dissemination of humanitarian law among the armed forces, the Italian government's financial contribution to ICRC activities and the future of the International Institute of Humanitarian Law in San Remo.

In addition to these meetings, the President of the ICRC gave a number of interviews to the press.

Brazil (4-6 March)

At the invitation of the Brazilian Government, Mr. Sommaruga, accompanied by Mr. Jean-Marc Bornet, Delegate General for Latin America, and Mr. Christophe Swinarski, regional delegate in Buenos Aires, travelled to Brazil on 4 March for a two-day visit.

On 4 March he had a meeting in Brasilia with the General Secretary of the Presidency of the Republic, H.E. Ambassador Marcos Coimbra, at which they discussed questions of mutual interest and the situation in the Middle East.

The ICRC President was received by leading members of the Federal Senate and Chamber of Deputies. His talks at the National Congress covered the progress made in legislative terms towards ratification of the Additional Protocols, and with the headquarters agreement on the setting-up of a new ICRC regional delegation in Brasilia.

Mr. Sommaruga then had an interview with the President of the Republic, Mr. Fernando Collor de Mello. On two matters there was complete agreement between the two men: the opening of an ICRC regional delegation in Brazil, with the conclusion of a headquarters agreement, and the need to speed up the process of ratification of the Additional Protocols. The President of the Brazilian Red Cross, Mrs. Mavy Harmon, took part in the discussions.

On 5 March, during an official ceremony at the Ministry of Foreign Affairs, the ICRC President and H.E. Ambassador Marcos Castriota de Azambuja, Acting Minister for Foreign Relations, signed the headquarters agreement for the new ICRC delegation in Brasilia.

After the signing ceremony, Mr. Sommaruga had a working meeting with the heads of various departments of the Foreign Ministry on problems of common interest.

The day ended with a press conference attended by all the main Brazilian media and representatives of foreign press agencies.

On 6 March President Sommaruga went to Rio de Janeiro, where he visited the Brazilian Red Cross headquarters.

This mission marked a significant step forward in relations between the ICRC and Brazil and opened up new prospects for ICRC presence and activities in the country.

United States (7 and 8 March)

On 8 March, the ICRC President was the guest of the President of the United States, Mr. George Bush. During an interview at the White House, also attended by Mrs. Elizabeth Dole, President of the American Red Cross, Mr. Bush thanked Mr. Sommaruga for the work undertaken by the ICRC in connection with the Middle East conflict. They then broached the main questions relating to the application of humanitarian law in times of armed conflict, examining in particular measures to be taken to ensure that the law was respected and given a prime place in the "new world order", as a factor for peace.

The situation in Israel and the occupied territories was discussed, as was the position of the American administration with regard to Additional Protocol I. The President of the ICRC also took the opportunity to give the US President a general overview of the humanitarian activities of the International Committee of the Red Cross around the world.

Later, Mr. Sommaruga, who was accompanied by Mr. Jean de Courten, Director of Operations, and Mr. Jean-Paul Fallet and Mr. Fred Isler from the New York delegation, had talks with General Colin Powell, Chairman of the Joint Chiefs of Staff. The discussions focused on the situation in the Middle East and respect for and dissemination of international humanitarian law.

The ICRC delegation was also able to discuss these matters with leading representatives of the State Department, in particular the Deputy Secretary of State, Mr. Lawrence Eagleburger, and members of the US Congress.

The same day, the ICRC President visited the President of the American Red Cross, Mrs. Elizabeth Dole, to review a number of aspects of the cooperation between the National Society and the ICRC.

On 7 March, Mr. Sommaruga had talks in New York with the Secretary-General of the United Nations, Mr. Javier Pérez de Cuéllar, and with the Austrian Ambassador to the UN, Mr. P. Hohenfellner, who was at the time President of the UN Security Council and Chairman of the Sanctions Committee.

SEMINAR ON THE IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW

Sofia, 20-22 September 1990

1. A Seminar on the Implementation of International Humanitarian Law (IHL), organized by the International Committee of the Red Cross (ICRC) in co-operation with the Bulgarian Red Cross and the International Institute of Humanitarian Law (IIHL), was held in Sofia from 20 to 22 September 1990.

2. *Dr. Kiril Ignatov*, President of the Bulgarian Red Cross, in opening the seminar, noted that participants included IHL and Red Cross experts from 11 European countries, in addition to representatives from various ministries of the Bulgarian Government. He said that the holding of the seminar was particularly important in this period of change within Bulgarian society. Dr. Ignatov announced that steps were being taken to remove Bulgaria's reservations to the 1949 Geneva Conventions and for Bulgaria to accept the competence of the International Fact-Finding Commission prescribed under Article 90 of Additional Protocol I. He expressed the hope that the seminar would lead to the adoption of measures to implement IHL in Bulgaria and that all participants would leave the meeting with new ideas about this important subject.

3. *Mr. Bruno Zimmermann*, on behalf of the ICRC, and Mr. Ugo Genesio, on behalf of the IIHL, also welcomed participants. The seminar's objectives were to enable persons already working in the field to continue their dialogue, to open up this exchange to new specialists, and to encourage the interest of others.

4. The seminar then appointed Mr. Bruno Zimmermann as its Chairman and Mr. Michael Meyer as its Rapporteur; it was also agreed that Ms. Emilia Yaneva would act as Secretary-General.

5. *Ms. María Teresa Dutli* presented the first paper, giving an overview of the ICRC's efforts to promote the adoption of national measures of implementation and the ICRC's assessment of the present

situation.[1] She noted that national measures of implementation need to be tailored to the specific requirements of each State. She also observed that certain provisions of the 1949 Geneva Conventions and of their two Additional Protocols of 1977 establish specific obligations, such as the duty to translate the Conventions into national languages and the obligation to repress grave breaches. The State party is also required to observe the spirit of other obligations, such as that of distinguishing civilians from military objects. Reference was made to Resolution V of the International Conference of the Red Cross held in 1986, which reaffirmed the duty of States under IHL to adopt national measures of implementation, to inform each other thereof through the depositary, and in addition appealed to States to inform the ICRC of such legislative and other measures, called on National Red Cross/Red Crescent Societies to help in the process, and asked the ICRC to gather and assess this information.

6. Pursuant to this International Conference resolution, the ICRC has twice approached governments for information on national measures to implement IHL. In the 37 responses received, there were various lacunae, including an absence of excerpts from laws or decrees and of suggestions on how the ICRC could be more useful to States in implementing IHL. Only a part of the responses were of a substantial nature, and most of these were from European countries. However this does not mean that countries which neither answered nor provided a substantial response have not taken the necessary measures to implement IHL.

7. In discussion, problems of implementation were identified. These included the need to translate treaty provisions into understandable texts that could be applied in practice; the need for implementation to occur at many different levels, within the armed forces and by governmental and other organizations; and competing priorites within a State.

8. Proposals to help remedy the situation were: a transfer of intellectual and financial resources from government to government and from one National Red Cross or Red Crescent Society to another; the provision of an expert or a group of experts to examine the reasons for non-implementation and to offer legal counselling; the holding of regional seminars; a reporting system that does not require reports at short intervals from those States which have already provided evidence of having implemented IHL; reports on national implementation

[1] See p. 134, "National measures to implement international humanitarian law – Steps taken by the ICRC".

measures by National Red Cross/Red Crescent Societies, and the preparation of model laws, suitable for different areas of the world. It was further suggested that a small committee of experts representing different legal systems could be established to help the ICRC assess the information received from governments.

9. In later discussions it was noted that Resolution V of the International Conference also invited National Red Cross/Red Crescent Societies to assist and co-operate with their own governments in helping them fulfil their obligation to implement IHL. National Societies could help motivate their authorities to take appropriate action. As a practical step, it was proposed that the ICRC could assist in training experts in the National Societies of those countries where no progress in implementation has been made, and such local experts could then help their authorities in tangible ways, such as by drafting implementing decrees.

10. As the next step for the ICRC in encouraging governments to implement IHL, it was suggested that the most effective action might be to send experts to the countries concerned to speak to the people responsible rather than to rely on further written communications.

11. *Mr. Ugo Genesio* explained the role of the IIHL in the promotion of IHL, particularly in the area of training, and the Institute's support for the efforts of the Red Cross and Red Crescent Movement to promote implementation of humanitarian law. He noted the difficulty of translating treaty obligations into national law and observed that one way to do this may be to establish an interministerial commission, entrusted with studying the treaty and, after taking into account the recommendations of international bodies, with giving advice on the adoption of national measures of implementation. Mr. Genesio then referred to various measures requiring implementation at national level, identified by the ICRC and set out in the 1986 International Conference document distributed to seminar participants. In conclusion, Mr. Genesio suggested that a future seminar might consider the adequacy of the international machinery for the implementation of IHL.

12. *Mr. Manuel Sager* described the role of Switzerland as the depositary State in the implementation of humanitarian law. This role is purely administrative in nature, and entails the transmission of the official translations of the Geneva Conventions and Additional Protocol I, and of implementing laws and regulations, to the High Contracting Parties. However, Switzerland, in its capacity as a High Contracting Party to these treaties, has submitted to the other States parties comprehensive information on its national measures of imple-

mentation to try to encourage them to fulfil their obligations in this area. Mr. Sager noted that if resources are a problem, then States that have the resources could provide assistance to other Governments in drafting national legislation, and the transmission of such laws by the depositary State could have a positive influence. Mr. Sager also discussed the role of Switzerland in relation to the establishment of the International Fact-Finding Commission under Article 90 of Additional Protocol I. It has been observed that inequitable geographical distribution of the States which have accepted the competence of the Commission could pose a problem, and suggested that until this situation is remedied, the establishment of the Commission should perhaps be postponed.

13. In discussion, it was suggested that, as the depositary, the Swiss Government could take a more active role, by reminding the High Contracting Parties of their duties under IHL and even by initiating joint activity by States to help other States implement their obligation to respect the Geneva Conventions and Additional Protocol I under Common Article 1 of those treaties. Mr. Sager was uncertain whether the Swiss Government would wish to fulfil such a role, although they may well be willing to respond to requests for help in implementing IHL at national level.

14. Comments were made regarding the establishment of the International Fact-Finding Commission. In the event of a problem of interpretation, all States party to Protocol I could be consulted as envisaged by Article 7 of that treaty. Moreover the States eligible to nominate members of the Commission may well nominate persons from different parts of the world. Indeed the acceptability of the Commission as a means of dispute settlement in every part of the world would require such a wide selection. More generally, the linkage between implementation and enforcement was noted, and it was recommended that States should give the ICRC a broader mandate in the area of implementation.

15. *Mr. Dieter Fleck* (Federal Republic of Germany) identified various problems related to the implementation of IHL, including the lack of motivation in peacetime to implement these rules; the perception that during armed conflict IHL is often violated without any penalty for such contraventions; ignorance of the content of humanitarian rules, and the complex and technical nature of certain implementing measures.[2] In his view, organizational and educational

[2] See p. 140, Dieter Fleck: "Implementing International Humanitarian Law: Problems and Priorities".

measures and publicity are most important for implementing IHL at national level. Joint efforts and continuous international co-operation are also required to work out plans of action and lists of priorities. He referred to the experience of the Federal Republic of Germany and gave a comprehensive account of implementing measures which have been taken and those which need to be taken. Serious efforts to implement IHL may have confidence-building effects.

16. Participants agreed that all legal commitments under IHL have the same status but that, for the purpose of implementation, a selection of priorities needs to be made. It was further agreed that, whereas it would be useful to study rules of engagement for armed forces, these were often regarded by States as being confidential in nature. Consequently, as a first step in that direction, States might be required to evaluate their rules of engagement internally, to ensure that they are in accordance with IHL, as they are required to do for new weapons under Article 36 of Protocol I. Certain measures of implementation are necessary to ensure the protection provided for by an IHL treaty, such as the protection of medical personnel and units under Additional Protocol I. In response to a recommendation that, since non-international armed conflicts are more prevalent, rules pertaining to them should be a priority for implementation, it was observed that no armed forces are trained to apply different rules in non-international armed conflict from those they apply in international armed conflicts.

17. *Professor Krzysztof Drzewicki* (Poland) described aspects of the relationship between international and national law. According to basic principles of international law, States must implement their international obligations in their domestic law, but at the same time, international law does not interfere with the way States will give effect to a treaty in their national legislation. Since the Second World War, the trend in international law has been to evolve from an inter-State law to a law governing the relationship between a State and an individual.

18. No single method of implementation is most effective or valid for all countries. What matters most is the will of a State to implement its obligations, not whether treaty rules become part of domestic law through incorporation or transformation. Most rules of IHL are self-executing, depending then only on direct applicability by State bodies and individuals. However, some of these provisions do contain an implicit obligation to adopt certain measures of implementation. Consideration needs to be given to the sort of measures that can help the ICRC convince States to implement IHL.

19. Problems arising from the recent past in Romania were identified, including a gap between national legislation and international treaty obligations, a lack of dissemination and an absence of legislative and administraive machinery designed to achieve the systematic implementation of IHL. In view of this, the priorities of the Romanian Association of Humanitarian Law include promotion of international humanitarian standards through the provision of professional advice to State agencies and educational activities.

20. Another participant observed that, since it is unrealistic to expect an individual to take legal action against his own State under the Geneva Conventions, the most effective measure to implement IHL at national level would be to remove obstacles to the work of the ICRC. However it was also noted that other implementing measures are necessary and required by IHL. The doctrinal controversy concerning the relationship of international and national law has practical relevance where a norm of IHL can be invoked in a domestic court: this can occur if such a norm is self-executing. Since the self-executing nature of norms is open to interpretation, and no court exists to give a ruling, writers on humanitarian law are able to help influence opinion on such matters. Lawyers need to learn more about IHL so that they feel more able to apply it. Measures for implementation can be divided into the five categories of dissemination, assistance, pressure, motivation and control.

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21. On 21 September, the session began with a presentation by *Mr. Luc De Wever* (Belgium) on the situation regarding the implementation of IHL in Belgium, and in particular the work of the Inter-Departmental Commission on IHL. This Commission is empowered to draw up a complete inventory of implementation measures and to draft the texts required by governmental bodies to implement IHL. The Commission also has a monitoring function once such measures have been implemented.[3]

22. The Inter-Departmental Commission consists of representatives of federal government departments, of the communities and regions, and of the Belgian Red Cross. The Chairman is a high-ranking military officer who also chairs the Commission fo National Defence

[3] See p. 154, Marc Offermans: "The Belgian Inter-Departmental Commission for Humanitarian Law".

Problems. The Belgian Red Cross provides the Secretariat. The Commission has drawn up two lists; one enumerating priority measures for implementation, and the other listing those measures which can be implemented gradually. Matters are dealt with by making one governmental department responsible for co-ordinating a particular item and for drawing up a working paper. To date 42 such documents have been produced; these are in the Flemish and French languages and are available to anyone interested.

23. Steps have been taken to set up a group of persons qualified in IHL, as envisaged under Article 6 of Protocol I, and to institute legal advisers, as prescribed by Article 82 of Protocol I. Efforts are being made to introduce a new penal law to repress grave breaches (Article 85 of Protocol I), and to conclude an agreement between the Government and the Red Cross on dissemination (Article 83 of Protocol I).

24. In discussion, it was reported that the ICRC had received information about similar inter-ministerial bodies but unfortunately did not know much about their work. The Belgian experience could provide a useful model both for States and for National Red Cross and Crescent Societies. In response to a question on creating an inter-departmental committee to deal with wider humanitarian problems such as refugees, it was stated that this did not seem feasible. Another query concerned financial aspects, and it was explained that the establishment and work of such a commission was not expensive, and that the government department responsible for an implementation measure also assumed its financing. It was reported that Sweden had a similar experience and that even with Sweden's familiarity with implementing reforms, it took 12 years to give effect to measures to implement the 1977 Additional Protocols.

25. *Mr. Konstantin Obradović* (Yugoslavia) discussed the legislative and regulatory measures necessary for the application of IHL. He referred to the relevant articles of the Geneva Conventions, which are reaffirmed in Article 80 of Additional Protocol I. He noted that these duties entail an obligation of result. In his opinion the minimum action required of a State must cover the following areas: military regulations concerning the application of IHL by armed forces; penal legislation to repress grave breaches; legislation on the status of the National Red Cross or Red Crescent Society and on the protection of the Red Cross or Red Crescent emblem. He then referred to the experience of Yugoslavia, where the most important implementing measure is a manual for the armed forces. Mr. Obradović noted that under

Yugoslavia's Constitution, it is a crime to recognize occupation. This is reflected in Yugoslavia's reservation to Additional Protocol I, which may have the effect of absolving an occupying power from respecting the relevant provisions of the Fourth Geneva Convention. Steps are being taken in the context of revising the Constitution to change this article, and consideration is also being given to withdrawing all Yugoslavia's reservations to the Geneva Conventions and to Protocol I.

26. In the debate, it was observed that IHL contains obligations of conduct, as well as of result. In this connection, reference was made to the prohibition of indiscriminate attacks under Article 51 of Additional Protocol I where what counts is not necessarily the damage to civilian objects but the way in which the damage is caused. Individual responsibility for grave breaches under Article 85 requires a wilful act and therefore also involves an obligation of conduct rather than result. A representative of the Hungarian Ministry of Defence gave an account of recent action taken in his country to implement IHL. These regulatory and educational measures demonstrated an admirable awareness and readiness to act in the area of implementation of humanitarian law.

27. *Professor Michael Bothe* (Federal Republic of Germany) addressed the matter of penal legislation to prevent and repress grave breaches. The repression of violations of IHL by criminal sanctions is not greatly influential in encouraging respect for the law. However, criminal sanctions are necessary in this area to show that violations of the fundamental values of the international community are subject to criminal law. Such sanctions must be properly established in terms of legal technique, entailing the adoption of clear legal rules and procedural guarantees.

28. States have used three approaches to repress breaches of IHL: first, some States have simply relied on their general criminal law; others have provisions of criminal law that make reference to conventional and customary international law; while other countries have specific provisions of criminal law relating to specific acts of warfare which are punishable. All three approaches have their drawbacks: the first is often used as a pretext for inaction, and the other two result in a lack of clarity. Professor Bothe considered that national criminal laws require evaluation to see if they do in fact cover all grave breaches, which in the case of Additional Protocol I is unlikely. The Belgian draft bill on penal sanctions is a useful model of legislation stipulating that specific acts of warfare are crimes, and it also contains

the Martens Clause which provides general protection to the victims of armed conflict based on customary law.

29. The law governing violations of non-international armed conflict requires development. It was noted that in such conflicts, individuals may be punished for the fact of mere participation in the conflict. National criminal laws also require examination from the viewpoint of criminology.

30. In the discussion, it was observed that extra-legal factors, such as reciprocity and public opinion, are more important than penal sanctions for promoting observance of humanitarian law. Regarding the question of superior orders, the prevailing opinion is that an individual tortfeasor should not be absolved from responsibility as a result of obeying manifestly illegal superior orders. Professor Bothe discussed the different fora which could be used to prosecute a person for violations of IHL. He concluded that the time may now be right for a cautious attempt to be made to raise once again the possibility of establishing an international criminal court.

31. The last speaker on 21 September, *Mr. Krister Thelin* (Sweden), discussed Sweden's experience in establishing a system of legal advisers in armed forces, as prescribed by Article 82 of Protocol I. Appointments were made following the coming into force of the 1986 Ordinance which instituted measures for the implementation of the Additional Protocols in Sweden. Seven legal advisers from the senior judiciary serve part-time in periods of peace, and 50 more legal advisers, also career judges, were appointed to serve as legal advisers in wartime. These 57 appointments should be considered in relation to the fact that in the event of armed conflict, 800,000 men may be mobilized.

32. The duties of the peacetime legal advisers, based on the 1986 Ordinance, include designing education in IHL, instruction for the wartime legal advisers, advice to military commanders on all aspects of international law, and participation in peacetime operational planning. To date, legal advisers have been welcomed by military commanders, but this may be because they are a novelty. It has proved important for the legal advisers to be of sufficiently high rank to be taken seriously. At the same time they must retain their integrity as lawyers and show their understanding of military requirements. The

legal advisers have not been tested in situations of armed conflict, and they must take steps to introduce IHL into military exercises.[4]

33. In discussion, it was reported that Bulgaria is instituting its own system of legal advisers, but that these are military officers trained in IHL. It was observed that such persons may be unable to interpret the law with sufficient flexibility. Poland also will be establishing a system of legal advisers, although that will take time and financial resources. It was noted that the need for legal advisers in armed forces illustrates the importance of having adequate staff to implement IHL, and this may be a relevant topic for discussion in connection with confidence-building in Europe. There was a clear consensus on the importance for the implementation of IHL of legal advisers in armed forces.

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34. The final day of the seminar was opened by *Ms. Emilia Yaneva* (Bulgaria), who explained the role of National Red Cross and Red Crescent Societies in initiating the dissemination and implementation of IHL and, in particular, described the many activities undertaken by the Bulgarian Red Cross in these areas. The International Humanitarian Law Commission of the Bulgarian Red Cross played an important role in promoting ratification of the Additional Protocols. They support regular training in IHL in the armed forces and encourage interest in the subject at universities, among young people and the

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[4] In 1979 Sweden ratified the 1977 Protocols additional to the 1949 Geneva Conventions, and was thus one of the first countries to do so.

In fulfilment of its obligations under the Conventions and Additional Protocols, the Swedish government appointed a special committee — the International Humanitarian Law Committee — to study and present proposals for the interpretation and application of the rules of international humanitarian law governing war, neutrality and occupation, and also to disseminate information on and promote teaching of these rules.

The Committee's comments and proposals were submitted to the Minister of Defence in 1984 in a report entitled "International Law in Armed Conflict".

In the late 1980s, on the basis if this report, the Swedish government drew up orders and directives for the military and civil authorities whithin Sweden's Total Defence System. In 1990 the government issued an ordinance — The Total Defence Ordinance relating to International Humanitarian Law — containing a summary of its views and related directives for the Swedish authorities concerned. The authorities are now adopting measures for the implementation of international humanitarian law.

In January 1991 the Swedish Ministry of Defence published a booklet entitled "International Humanitarian Law in Armed Conflict with reference to the Swedish Total Defence System".

This booklet is a compilation of the most important sections of the report of the International Humanitarian Law Committee and of the government's related decisions addressed to the Swedish authorities concerned.

general public. Suggestions have been made to the authorities regarding national measures of implementation and, in due course, the establishment of an inter-ministerial commission may be proposed.

35. In discussion, the importance of co-operation among the ICRC and National Societies, and other bodies interested in dissemination, such as the IIHL, was stressed. Dissemination work does not require great financial means: determination and courage are more essential factors.

36. *Colonel Hristo Rastashki* (Bulgaria) reported on the background to the development of dissemination within the Bulgarian armed forces. International seminars, held in Bulgaria with the assistance of the ICRC and the IIHL, helped significantly to promote ratification of the Additional Protocols and gave impetus to regular training in IHL at different levels within the armed forces. Such training is a prerequisite to observance of Bulgaria's obligations under IHL. The political will to promote IHL in Bulgaria is clear, and with the help of the Bulgarian Red Cross and others, efforts in that direction will continue.

37. In his concluding remarks, *Mr. Zimmermann* said that the ICRC's objectives for the seminar had been achieved. Note had been taken of all the proposals to enhance the implementation of IHL at national level. These could be placed into three categories: those measures which have already been taken and could be repeated, like regional seminars, and which should be increased, such as co-operation between State and other bodies; those ideas meriting consideration, but which cannot be undertaken, at least not in any systematic way, until after the next International Conference of the Red Cross and Red Crescent in 1991, such as meetings with the responsible officials of each country; and those more extensive proposals which, it is hoped, will include proposals from States and National Societies, and will require further study at the next International Conference, such as the establishment of a group of experts, possibly on an informal basis, to help assess information received by the ICRC. The ICRC hopes to submit to that Conference substantial information and specific proposals to promote the implementation of IHL, and towards this end it will also make every possible effort to ensure that the subject of national measures for the implementation of humanitarian law is discussed in the most effective way at the Conference.

38. *Ms. Yaneva*, on behalf of the Bulgarian Red Cross, expressed the hope that all the participants had found the seminar useful, and said that a copy of the summary report would be considered by the Legislative Commission of the Bulgarian Parliament.

NEW PARTIES TO THE GENEVA CONVENTIONS AND THE ADDITIONAL PROTOCOLS

Accession of the Kingdom of Bhutan to the Geneva Conventions

On 10 January 1991, the Kingdom of Bhutan deposited its instrument of accession to the four Geneva Conventions of 12 August 1949 with the Swiss Government.

Pursuant to their provisions, the Geneva Conventions will enter into force for the Kingdom of Bhutan on 10 July 1991.

The Kingdom of Bhutan thus becomes the **165th** State party to the Geneva Conventions.

The Federal Republic of Germany ratifies the Protocols

On 14 February 1991, the Federal Republic of Germany ratified the Protocols additional to the Geneva Conventions of 12 August 1949 relative to the protection of victims of international (Protocol I) and non-international (Protocol II) armed conflicts, adopted in Geneva on 8 June 1977.

The instrument of ratification was accompanied by various declarations, the text of which is given below.

1. *It is the understanding of the Federal Republic of Germany that the rules relating to the use of weapons introduced by Additional Protocol I were intended to apply exclusively to conventional weapons without prejudice to any other rules of international law applicable to other types of weapons.*
2. *The Federal Republic of Germany understands the word "feasible" in Articles 41, 56, 57, 58, 78 and 86 of Additional Protocol I to mean that which is practicable or practically*

possible, taking into account all circumstances ruling at the time including humanitarian and military considerations.

3. *The criteria contained in the second sentence of Article 44, paragraph 3, of Additional Protocol I for distinction between combatants and the civilian population are understood by the Federal Republic of Germany to apply only in occupied territories and in the other armed conflicts described in Article 1, paragraph 4. The term "military deployment" is interpreted to mean any movements towards the place from which an attack is to be launched.*

4. *It is the understanding of the Federal Republic of Germany that in the application of the provisions of Part IV, Section I, of Additional Protocol I, to military commanders and others responsible for planning, deciding upon or executing attacks, the decision taken by the person responsible has to be judged on the basis of all information available to him at the relevant time, and not on the basis of hindsight.*

5. *In applying the rule of proportionality in Article 51 and Article 57, "military advantage" is understood to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack.*

6. *The Federal Republic of Germany will react against serious and systematic violations of the obligations imposed by Additional Protocol I and in particular its Articles 51 and 52 with all means admissible under international law in order to prevent any further violation.*

7. *Article 52 of Additional Protocol I is understood by the Federal Republic of Germany to mean that a specific area of land may also be a military objective if it meets all requirements of Article 52, paragraph 2.*

8. *Article 75, paragraph 4, subparagraph (e) of Additional Protocol I and Article 6, paragraph 2, subparagraph (e) of Additional Protocol II will be applied in such manner that it is for the court to decide whether an accused person held in custody must appear in person at the hearing before the court of review.*

   Article 75, paragraph 4, subparagraph (h) of Additional Protocol I will only be applied to the extent that it is in conformity with legal provisions which permit under special circumstances the re-opening of proceedings that had led to final conviction or acquittal.

9. *With respect to Article 90, paragraph 2, of Additional Protocol I, the Federal Republic of Germany declares that it recognizes the competence of the International Fact-Finding Commission,* ipso facto *and without special agreement, in relation to any other High Contracting Party accepting the same obligation.*
10. *The Federal Republic of Germany understands paragraph 3 of Article 96 of Additional Protocol I to mean that only those declarations made by an authority which genuinely satisfies all the criteria contained in paragraph 4 of Article 1 can have the legal effects described in subparagraphs (a) and (c) of paragraph 3 of Article 96.* (Officially translated by the German authorities.)

The Federal Republic of Germany is the **twenty-first** State to make the declaration accepting the competence of the International Fact-Finding Commission.

In accordance with their provisions, the Protocols will come into force for the Federal Republic of Germany on 14 August 1991.

The Federal Republic of Germany is the **100th** State to become party to Protocol I and the **90th** to Protocol II.

AWARD OF THE PAUL REUTER PRIZE

The jury of the Paul Reuter Prize met in Geneva on 7 March 1991 and unanimously decided that the prize would exceptionally be awarded to two candidates,

Edward Kwakwa, LL.D.

a lawyer from Ghana, for his thesis entitled *Trends in the international law of armed conflict: claims relating to personal and material fields of application*; and

Alejandro Valencia Villa

a lawyer from Colombia, for his work entitled *La humanización de la guerra: la aplicación del derecho internacional humanitario al conflicto armado en Colombia.*

The jury emphasized the remarkable quality of both works, which constitute a major contribution to international humanitarian law.

The jury of the Paul Reuter Prize, chaired by Paolo Bernasconi, member of the ICRC, is made up of Professors Luigi Condorelli and Giorgio Malinverni of Geneva University, as well as members of the ICRC administration.

In 1982, the late Paul Reuter, former Professor Emeritus at the Paris University of Law, Economics and Social Sciences, and former Chairman of the United Nations International Law Commission, made a donation enabling the ICRC to set up the Paul Reuter Fund, the income of which is used to promote better knowledge and understanding of international humanitarian law. The Fund also provides for the award, generally once every two years, of a Paul Reuter Prize of 2,000 Swiss francs, in recognition of a particularly outstanding work in the field of international humanitarian law.

This is the third award of the Prize since the Fund was created. The winners will receive their prizes this spring.

NATIONAL IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW

This issue of the *Review*, devoted to the implementation of international humanitarian law (IHL), would not be complete without due mention of the above work.[1] It comprises the proceedings, edited by Professor Michael Bothe in co-operation with Thomas Kurzidem and Peter Macalister-Smith, of a three-day colloquium organized in 1988 by Professor Bothe on the theme of national implementation of IHL.

The colloquium was an important step in Professor Bothe's work in this area: after spending several years collecting relevant source material a group of experts from a number of countries met to exchange their views, compare different national experiences and propose certain solutions, or at least guidelines for further research on the subject.

As the next step, the editor envisages publishing a separate volume containing the source material compiled by and for the colloquium participants and later supplemented and completed by the organizers.

The book follows the order in which the various items on the agenda were discussed. The debate itself is divided into four parts, followed by closing remarks, additional papers, and conclusions by Professor Bothe, who acted as Chairman.

The first two parts provide an instructive overview of issues which are regularly the subject of discussion, namely, the relationship between international and national law, and repression of violations of IHL. The reader will be interested to note that, as pointed out in the debate, apparent differences between legal systems often mask situations which are in reality quite similar, and that the choice between summary and detailed legislation must depend above all on its chances of being adopted and effectively applied.

The third part deals with rules of national law relating to the special status granted under IHL to combatants, civilians, medical units and personnel, civil defence units and personnel, National Red Cross and Red Crescent Societies, other voluntary aid societies, and the red cross/red crescent emblem. The participants noted that some of the difficulties encountered in this field

[1] *National Implementation of International Humanitarian Law, Proceedings of an International Colloquium held at Bad Homburg, June 17-19, 1988*, edited by Michael Bothe in co-operation with Thomas Kurzidem and Peter Macalister-Smith, Martinus Nijhoff Publishers, Dordrecht, 1990, 286 pp.

stemmed from deliberate ambiguity on the part of international law-makers, while others arose simply from the necessity for each State to take its own decisions in a comprehensive and consistent manner.

The fourth part of the book is devoted essentially to military manuals and other administrative rules relating to armed conflicts. During the debate it was pointed out that military manuals were indispensable in making IHL accessible to the armed forces, and that they also gave an insight into the views of various States on given points of the law of war, without being taken *a priori* as the States' official position. It was further mentioned that even though extensive and far-reaching consultation among States in drafting such texts was desirable, it seemed difficult to envisage two or more States using the same manual.

This volume, which includes a selected bibliography, is of the greatest interest and should prove extremely useful to all those who are concerned with the implementation of IHL. By identifying the problems involved, presenting a host of different experiences and proposing solutions to a number of difficulties, it offers encouragement as well as practical help to everyone involved in this field.

We should like to conclude this review by noting that the States which have only just begun to implement IHL at the national level — provided that their work is concluded within a reasonable period — should take comfort from the fact that, as openly recognized by the colloquim participants, large States too have encountered many difficulties in carrying out this task.

Bruno Zimmermann

INTERNATIONAL HUMANITARIAN LAW THE REGULATION OF ARMED CONFLICTS

The Gulf crisis has once again brought home to us the relevance of international humanitarian law. The new book by Hilaire McCoubrey, a lecturer at the University of Nottingham in Great Britain, is therefore timely indeed.* This handy, comprehensive and eminently readable introduction to the subject is not only a useful source of knowledge for the student but will also be appreciated as a resource work for teachers and those engaged in advanced studies.

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* Hilaire McCoubrey, *International Humanitarian Law, The Regulation of Armed Conflicts*, Dartmouth, 1990, 227 pp.

McCoubrey has divided his work into ten chapters *(Humanitarianism in the Laws of Armed Conflict, Implementation and Institutions, Protection of Injured and Sick on Land, Protection of Injured, Sick and Shipwrecked at Sea, Protection of Prisoners of War, Protection of Civilians and Civilian Objects, Humanitarian Restrictions upon Means and Methods of Warfare, Humanitarian Provision in Non-International Armed Conflicts, Derogations and Exceptions, Dissemination and Repression of Abuses).* He thus covers all the aspects needed to understand this branch of law, including practical problems faced in implementing its provisions.

A detailed description of the contents would be beyond the scope of this review, so I shall confine myself to the following few remarks.

The author goes to considerable effort to avoid representing international humanitarian law as a realm apart, repeatedly reminding the reader that it is a constituent section of international law as a whole. In particular, he singles out its relationship with human rights law and refugee law.

McCoubrey is in no doubt that the Additional Protocols of 1977 are today an integral part of the international humanitarian law in force. His book is the first description of this body of law published in English that systematically takes into account the 1977 Protocols' innovations.

Throughout the text, the author endeavours to illustrate the provisions with examples from real life, and he succeeds splendidly. Examples from the First and Second World Wars, the Vietnam War, the wars in the Middle East and the Falklands/Malvinas conflict greatly facilitate the reader's understanding of the subject.

Such a compact introduction to such a broad subject inevitably contains statements that call for contradiction, or falls short of expectations in its coverage of certain aspects.

One wonders, for example, whether the rules governing the actual waging of war, i.e., those legal rules which for humanitarian reasons impose constraints on the conduct of military operations, did get the attention they deserve. McCoubrey also says little about an important aspect of the law on prisoners of war, i.e., the repatriation of prisoners against their will and the problems involved. It must also be asked whether a slightly less esoteric definition of reprisal (drawn from another work) might not have served as a simpler introduction to a difficult subject. Finally, I was somewhat perturbed by his suggestion that the doctrine of military necessity should be resurrected, though in a modified form (pp. 201-202). It seems to me that the obligations laid down by the international humanitarian law in force are worded in such a way that compliance with them is possible in all circumstances. Surely these obligations should not be undermined.

Nevertheless, in writing this book McCoubrey has made an outstanding contribution towards a better understanding of international humanitarian law.

Hans-Peter Gasser

ADDRESSES OF NATIONAL RED CROSS AND RED CRESCENT SOCIETIES

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